

Matter of Davis v City of New York

2010 NY Slip Op 31012(U)

February 21, 2010

Sup Ct, NY County

Docket Number: 102543/10

Judge: Cynthia S. Kern

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SCANNED ON 4/27/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 52

NIKEEMA DAVIS,

INDEX NO. 102543 / 10

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

CITY OF NY,

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 attached decision.

FILED
APR 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/21/10

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

In the Matter of the Application of

NIKEMA DAVIS,

Petitioner,

Index No. 102543/10

-against-

DECISION/ORDER

CITY OF NEW YORK and NYC DEPARTMENT OF
HOUSING PRESERVATION & DEVELOPMENT,

Respondent.

FILED
APR 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----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> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Claimant seeks leave to file a late Notice of Claim on defendants City of New York (the "City") and New York City Department of Housing Preservation and Development ("HPD") for her action to recover for injuries that she allegedly sustained when the ceiling in the apartment where she lived with her grandmother at 110 Lenox Avenue collapsed on October 19, 2009. For the reasons set forth below, claimant's motion is granted.

The relevant facts are as follows. On October 19, 2009, the ceiling in the apartment

where claimant resides with her grandmother collapsed, allegedly injuring claimant. An ambulance and the New York City Fire Department responded to the accident. Claimant's aunt also called 311 and the building superintendent and informed them of the incident. On November 30, 2009, plaintiff's aunt received a letter from defendant HPD acknowledging that it was aware of the accident and that it had repaired the ceiling. After claimant's counsel was retained with regard to the incident, he examined the New York City Housing Authority's property directory to determine if 110 Lenox Avenue was owned by defendant City and did not find the property listed. On February 8, 2010 claimant brought the letter from the HPD to the attention of her attorney, who promptly called the HPD to confirm that it owned the property where the incident occurred. The HPD confirmed that it owned the property, but under the address 72 West 116th Street and not 110 Lenox Avenue. Claimant's counsel filed a Notice of Claim with the City and HPD the following day. Claimant seeks leave to file a late Notice of Claim pursuant to General Municipal Law §50-e.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to G.M.L. §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 municipality acquired "actual knowledge of the essential facts constituting the claim" within ninety days after the claim arose or within a reasonable time thereafter and whether the delay prejudiced the municipality's defense. *See* Gen. Mun. Law §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).

Considering all the above factors together, plaintiff's motion to serve a late notice of claim is granted. Claimant has a reasonable excuse for her delay in filing a Notice of Claim. Claimant did not realize that HPD owned the building, which was listed in the NYC Property Database under a different address. Claimant's counsel filed a Notice of Claim immediately upon ascertaining the building's ownership. The City also had actual knowledge of the facts constituting the claim. Claimant's aunt informed both 311 and the building superintendent of the accident on the day it occurred and received a letter from HPD within the ninety day period acknowledging that it was aware of the incident and stating that it had repaired the ceiling. Moreover, the five week delay did not prevent the City from acquiring knowledge within a reasonable time period. Furthermore, the City and HPD have not been prejudiced by the delay in filing the Notice of Claim. Because defendants had actual knowledge of the claim, they had the opportunity conduct an investigation of the incident in a timely manner. Not only did defendants have opportunity to investigate, the letter sent to claimant's aunt and the repair work performed on the apartment suggest that HPD actually did conduct an investigation within the first ninety days after the accident occurred.

Accordingly, claimant's motion to serve a late notice of claim is granted. The constitutes

the decision and order of the court.

Dated: 4/21/10

Enter: CK
 J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED
APR 27 2010
NEW YORK
COUNTY CLERK'S OFFICE