Shoemaker v County of Greene
2010 NY Slip Op 31328(U)
June 1, 2010
Sup Ct, Greene County
Docket Number: 10/113
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

CALISE A. SHOEMAKER,

Plaintiff,

-against-

THE COUNTY OF GREENE,

Defendant.

DECISION and ORDER
INDEX NO. 10-113
RJI NO. 19-10-4791

Supreme Court Greene County All Purpose Term, May 7, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Linnan & Fallon, LLP
Shawn May, Esq.
Attorneys for Plaintiff
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Albany, New York 12210

Greene County Attorney
Carol Stevens, Esq.
Attorneys for the Defendant
411 Main Street
Catskill, New York 12414

TERESI, J.:

On October 19, 2009, Plaintiff was injured in a motor vehicle accident, which occurred on Greene County highway 51 near its intersection with Greene County highway 54. As a prerequisite to commencing a tort action against Defendant, General Obligations Law 50-e required Plaintiff to file and serve a notice of claim within 90 days of the accident. Plaintiff, however, failed to file or serve her notice of claim prior January 18, 2010, the date her time to file and serve expired.

Plaintiff now moves this Court for an Order authorizing her late service and filing of a

notice of claim, which alleges Defendant's negligent design, construction, maintenance and signage of the roadway on which her accident occurred. Defendant opposes the motion. Because Plaintiff demonstrated her entitlement to the relief she seeks, her motion is granted.

Permission to serve a late notice of claim may be granted only after analyzing "whether the public corporation [defendant] acquired actual knowledge, within 90 days or a reasonable time thereafter, of the facts constituting the claim, the reasonableness of the excuse proffered for the delay in filing, as well as whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits." (Hubbard v. County of Madison, 71 AD3d 1313 [3d Dept. 2010], citing General Municipal Law § 50-e[5]). "The decision [of whether] to permit the late filing of a notice of claim pursuant to General Municipal Law § 50-e (5) is committed to the discretion of the trial court." (Petersen v. Susquehanna Valley Cent. School Dist., 57 AD3d 1332 [3d Dept. 2008], quoting Matter of Dewey v. Town of Colonie, 54 A.D.3d 1142 [3d Dept. 2008]). However, "where a [plaintiff] fails to show that the [defendant] acquired knowledge of the claim within a reasonable time, it is an improvident exercise of discretion to grant the application." (Heffelfinger v. Albany Intern. Airport, 43 AD3d 537 [3d Dept. 2007], Cook v. Schuylerville Cent. School Dist., 28 AD3d 921 [3d Dept. 2006]).

Here, although Plaintiff did not demonstrate that Defendant received actual notice of the claim within 90 days following the incident, she did demonstrate that they received such notice within "a reasonable time thereafter." (Hubbard, supra). In support of her motion, Plaintiff offers no proof that Defendant received actual knowledge of this incident within 90 days of its occurrence. The New York State Police's "Accident Report" fails to demonstrate Defendant's actual knowledge, and Plaintiff's counsel acknowledged that he is "unclear" whether Defendant

received actual knowledge. However, Plaintiff did demonstrate that Defendant received actual knowledge of the claim within "a reasonable time" after the expiration of the 90 days. Plaintiff made this motion when it was served on January 25, 2010 (CPLR §2211), which provided Defendant with actual knowledge of Defendant's claim. As it is uncontested that Plaintiff's motion was received by Defendant approximately one week after the 90 days expired, Defendant received actual knowledge of Plaintiff's claim within "a reasonable time."

Similarly, Plaintiff demonstrated that Defendant was not "substantially prejudiced" by the delay. Again, Plaintiff was not required to file and serve her notice of claim until approximately seven days before making this motion. As such, Defendants would suffer no prejudice from the loss of transitory evidence (i.e. road makings, debris, or condition of the motor vehicles) from the one week delay because such evidence would have already have been lost prior to January 18, 2010. (Hubbard, supra, Schwindt v. County of Essex, 60 AD3d 1248 [3d Dept. 2009]), Cuda v. Rotterdam-Mohonasen Cent. School Dist., 285 AD2d 806 [3d Dept. 2001]). No showing was made that such transitory evidence was lost between the expiration of Plaintiff's time to file and serve her notice of claim and her making this motion. Moreover, Defendant does not contest Plaintiff's attorney's allegation that the permanent road conditions at the accident's location have not changed since the accident. Nor, did Defendant make any showing that it lost material witnesses due to the one week delay. On this record, Defendant "failed to come forward with specific evidence demonstrating any impairment to its ability to conduct a defense as a result of the delay." (Apgar ex rel. Apgar v. Waverly Cent. School Dist., 36 AD3d 1113, 1115 [3d Dept. 2007]). As such, no substantial prejudice has been shown.

Lastly, Plaintiff's proffered excuse for the delay, while not compelling, is reasonable.

Plaintiff's attorney alleges that the delay has been caused by his investigations into what entity controls the roadway where the accident occurred. As a protracted investigation has been held to constitute a reasonable excuse for late filing a notice of claim, Plaintiff's proffered excuse is also reasonable. (Matter of Dewey, supra,). Moreover, even if such excuse were not reasonable, the failure to provide a reasonable excuse "is not necessarily fatal to [an] application... because no one factor is dispositive of the issue." (Welch v. Board of Education of Saratoga Central School District, 287 AD2d 761, 762-63 [3d Dept. 2001][internal quotations and citations omitted]; Isereau v. Brushton-Moira School District, 6 AD3d 1004 [3d Dept. 2004]).

Accordingly, because each of the factors set forth above weigh in favor of Plaintiff, her motion is granted. Plaintiff must file and serve her notice of claim upon the Defendant within fifteen days of the date of this Decision and Order.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 1, 2010
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated January 22, 2010, Exhibit A, Affirmation of Shawn May, dated January 25, 2010, Notice of Claim, dated January 25, 2010, Notice of Claim Verification, dated January 25, 2010, Affidavit of Mailing, dated January 25, 2010.
2. Affidavit of Murry Brower, dated February 12, 2010.