

Matter of Fernandez v City of New York

2010 NY Slip Op 31459(U)

June 7, 2010

Sup Ct, NY County

Docket Number: 102343/2010

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

~~PA~~ PART 16

Index Number : 102343/2010
FERNANDEZ, PAULA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOT. OF CLAIM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

NOTICE OF MOTION/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition for

leave to file a late notice of claims is granted in accordance with the accompanying memorandum decision.

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 141B).

JUN 07 2010

Dated: June 7, 2010

Alice Schlesinger
ALICE SCHLESINGER 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

-----X
In the Matter of the Application of
PAULA FERNANDEZ,

Petitioner,

Index No. 102343/10
Motion Seq. No. 003

For Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules

-against-

THE CITY OF NEW YORK,

Respondent

SCHLESINGER, J.:

UNFILED JUDGMENT
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Petitioner Paula Fernandez has commenced this proceeding seeking to serve a late notice of claim, pursuant to General Municipal Law §50-e, subd. 5.

Respondent the City of New York (the City) has opposed the petition, contending that granting the application would be an abuse of discretion. For the reasons set forth herein, the petition is granted.

Background

On May 22, 2009, Ms. Fernandez was walking in front of 2010 Lexington Avenue when she allegedly fell on a raised area of sidewalk. After her fall, she was assisted by pedestrians and officers of the New York City Police Department as she waited for an ambulance. An ambulance operated by the New York City Fire Department transported Ms. Fernandez to North General Hospital. Ms. Fernandez claims that she sustained fractures to her left wrist and right knee, and suffers chest and back pain from the alleged fall.

Ms. Fernandez initially determined that the sidewalk was owned by Metpaca Real Estate Corp. and leased by Jebke Liquor Store Corp. This determination was

based on an examination of the parcel's mortgage records. Additional research revealed that the last deed recorded indicates that the property belongs to the City, and this deed has led Ms. Fernandez to believe that the City may own the premises. Therefore, Ms. Fernandez seeks leave to file a late notice of claim against the City and have it deemed timely served *nunc pro tunc* pursuant to General Municipal Law Section 50e-(5).

Rules Governing a Late Notice of Claim

Pursuant to General Municipal Law §50-e, subd. 1(a), a claimant commencing a tort action against a public corporation must serve and file a proper notice of claim within ninety days after the claim arises. The related action or proceeding must be commenced within one year and ninety days of the event. Gen. Mun. Law §50-l. An application for an extension of time to serve a notice of claim may be made before or after the action has been commenced, but not after the one-year and ninety-day statute of limitations has run, unless the statute has been tolled. Gen. Mun. Law §50-e, subd. 5; *see also Nunez v. The City of New York*, 307 A.D.2d 218, 219 (1st Dep't 2003); *Pierson v. City of New York*, 56 N.Y.2d 950, 954 (1982). Since petitioner filed this motion in or about March of 2010, within a year and ninety days from the incident, the motion was timely made.

The next issue is whether leave should be granted to file a late notice of claim pursuant to General Municipal Law 50-e, subd. 5. In determining whether leave should be granted to serve a notice of claim after the ninety-day period, "the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality

acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.’” *Velazquez v. The City of New York Health and Hospitals Corp.*, 69 AD3d 441, 442 (1st Dept. 2010), quoting *Matter of Dubowy v. City of New York*, 305 A.D.2d 320, 321 (1st Dept. 2003).

Petitioner has Established a Reasonable Excuse for the Late Filing

Petitioner asserts that she should be excused for not timely serving the City because she relied in good faith on the property search she conducted that indicated that Metpaca held two mortgages on the property. Only later did petitioner discover that prior to Metpaca's two mortgages on the property the City of New York had recorded a deed on the property (Petitioner Exh. C).

The Court finds that petitioner exercised reasonable efforts to ascertain the true ownership of the property and that the delay in discovering the City's ownership was excusable. Petitioner's reliance on the mortgage records was not negligent or unreasonable, even though the records ultimately gave an incomplete report on the property's ownership,.

The City relies on *Seif v. City of New York*, 218 A.D.2d 595 (1st Dept. 1995), but the case is distinguishable. In *Seif* the Court denied petitioner's motion for leave to file a late notice of claim because of a law office's failure to properly research the ownership of the building. In *Seif*, however, the petitioner gave no reason for its initial failure to recognize the City as owner, while in the instant case the error was excusable,

as described above. There was therefore no “law office failure” analogous to the that identified in *Seif*.

Moreover, the decision in *Seif* to deny leave to file a late notice of claim was motivated in large part by the transient nature of the dangerous condition in that case (a sheet of ice), which would have prejudiced the City’s ability to defend the lawsuit, had it been allowed to proceed. *Id.* at 596-97. Here, as discussed below, the defect was not transient and the City still has a chance to investigate the condition so as to defend the suit as though the notice of claim had been timely filed. In any event, the “failure to set forth a reasonable excuse is not, by itself, fatal to the application.” *Velasquez*, 69 AD3d at 442, citing *Matter of Ansong v City of New York*, 308 AD2d 333, 334 (2003).

The City had Actual Notice of the Facts and will Suffer No Prejudice

“When considering a motion to extend the time for the service, the court must consider whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period or within a reasonable time thereafter, and whether, among other things, the delay in service substantially prejudiced the corporation in defending on the merits.” Gen Mun 50-e(5). Contrary to respondent’s claim, this Court finds that the City did acquire actual knowledge of the essential facts constituting the claim. Both the New York City Police and Fire Departments assisted the petitioner after her alleged fall. The Fire Department created a record of the event and transported petitioner to the hospital (Pet. Exh. G). In the course of assisting petitioner, the Police and Fire Departments were made aware of the time, date and location of the accident, and the general nature of petitioner’s injuries.

This information was recorded in an incident report completed by the NYPD EMS. Under the circumstances, the Court concludes that the City had sufficient notice of the facts underlying the claim to allow the late filing.

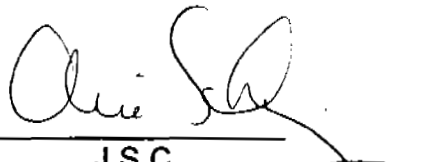
The final consideration under GML 50-e(5) is whether the City would be prejudiced in its defense were petitioner permitted to proceed with her claim despite filing a late notice of claim. Here, the Court finds that the City would not be prejudiced by the late filing. The accident alleged by petitioner involves a raised sidewalk — a non-transient defect that the City can investigate as easily today as it could have last year, had petitioner filed a timely notice of claim. In fact, petitioner has provided photographs with her motion that indicate that the condition today is substantially the same as it was at the time of the alleged accident. What is more, the City fails to adequately explain why its defense would be compromised by granting leave to petitioner to file a notice of claim at this time.

Accordingly, it is hereby

ORDERED AND ADJUDGED that petitioner's motion for leave to serve a late notice of claim is granted, and the notice of claim is deemed timely served in the proposed form annexed to the moving papers upon petitioner's service of a copy of this order and judgment with notice of entry on the respondent's counsel.

This constitutes the decision and judgment of the Court.

Dated: June 7, 2010



JUN 07 2010

UNFILED JUDGMENT

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 141B).

J.S.C

Alice SCHLESINGER