Wesolowski v Town of Oyster Bay
2010 NY Slip Op 32354(U)
August 20, 2010
Sup Ct, Nassau County
Docket Number: 3266/10
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

______________________________________x

SZCZEPAN WESOLOWSKI,

Petitioner(s),

-against-

THE TOWN OF OYSTER BAY, COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, MASSAPEQUA WATER DISTRICT and INCORPORATED VILLAGE OF MASSAPEQUA,

Respondent(s).

______________________________________x

Index No. 3266/10

Motion Submitted: 5/21/10
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................X
Answering Papers...XXXX
Reply...
Briefs: Plaintiff's/Petitioner's......................................
Defendant's/Respondent's................................

Petitioner moves this Court for an order permitting him to file a late Notice of Claim upon the respondents. Respondents oppose the requested relief.

The instant action was commenced as the result of petitioner's fall from a ladder while he was working at a Massapequa Water District site on July 31, 2009. Petitioner claims that he injured his left knee in that fall. Petitioner's Notice of Claim is dated January 11, 2010, and it was received by the various respondents on or about January 13, 2010. Petitioner claims that he was incapable of filing a timely Notice of Claim because he underwent unrelated wrist surgery two months after his fall from the ladder, and because he was unaware of the severity and permanency of his knee injury until on or about January 6, 2010.

General Municipal Law § 50-e provides for the filing of a Notice of Claim with the public corporation who may be liable for the happening of an incident. Said Notice of Claim should be filed prior to the commencement of an action. The trial court has broad discretion whether to grant leave to file a late notice of claim. In making its determination, the Court should consider whether, *inter alia*, the petitioner has demonstrated a reasonable excuse for failing to timely serve a notice of claim, the public corporation has acquired actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim has arisen, or within a reasonable time thereafter, and whether the delay in serving the notice of claim would substantially prejudice the public corporation in maintaining its defense on the merits. (***Alexander v. Board of Education***, 18 A.D.3d 654, 794 N.Y.S.2d 687 (2d Dept., 2005); ***Andrew T.B. v. Brewster Central School District***, 18 A.D.3d 745, 795 N.Y.S.2d 718 [2d Dept., 2005]).

Considering petitioner's excuses for filing his Notice of Claim some six and one-half months after the accident, this Court finds that those excuses are not supported by the evidence submitted. Petitioner's wrist surgery occurred on September 24, 2009, almost two months after the accident giving rise to this action. Although petitioner claims in his affidavit that he was "homebound" as a result of his wrist surgery and unable to attend to his affairs, he has not submitted any evidence establishing that he was, for example, bedridden. According to his own affidavit, petitioner was "homebound except when I was obtaining necessary medical treatment," presumably for therapy or doctor's appointments. Thus, petitioner appears to have been able to leave his home. Petitioner has also failed to submit a physician's affirmation attesting to his incapacity as a result of the wrist surgery. In fact, the medical records pertaining to his wrist surgery state that petitioner "tolerated the procedure well and was taken to the . . . recovery room in excellent condition." Petitioner has not submitted any records establishing that he remained in any hospital overnight. Thus, the Court finds defendant's excuse of incapacity to be unavailing (*see* ***Matter of Korman v. Bellmore Public Schools***, 62 A.D.3d 882, 879 N.Y.S.2d 194 (2d Dept., 2009); ***Matter of Kumar v. City of New York***, 52 A.D.3d 517, 860 N.Y.S.2d 144 [2d Dept., 2008]).

Defendant's claim that he was unaware of the severity or permanency of his injury is equally unsupported by the evidence submitted. Although petitioner submitted the affirmation of Andrew D. Brown, M.D. attesting to the fact that the doctor advised petitioner that the knee strain would heal within a "few weeks or months,"petitioner had apparently determined at some point in the early Fall of 2009 that his knee was more seriously injured than originally suspected. According to his own affidavit, petitioner's knee failed to improve despite physical therapy, and he complained to his physician, who referred him for an MRI. The MRI was performed on November 17, 2009, approximately three weeks after the expiration of the 90-day period in which to file a Notice of Claim. The MRI report documenting a tear in the meniscus of petitioner's knee was generated on November 18,

2009 according to Dr. Brown's affirmation. Despite the fact that the MRI was performed in mid-November and showed a tear, petitioner failed to take any further action against respondents for almost another two months. The fact that petitioner did not "follow up" with Dr. Brown until January 6, 2010, does not establish that the seriousness of petitioner's injury was not apparent until that time (*see* ***Godfrey v. City of New Rochelle***, 2010 N.Y. Slip Op. 5359, 903 N.Y.S.2d 497; *cf.* ***Matter of Brown v. New York City Housing Authority***, 194 A.D.2d 667, 599 N.Y.S.2d 92 [2d Dept., 1993]).

Although petitioner has not provided a reasonable excuse for the delay in timely serving respondents with a Notice of Claim, that is but one factor to consider in determining whether to allow service of a late notice of claim. The absence of a reasonable excuse for the delay is not necessarily fatal. (***Brownstein v. Incorporated Village of Hempstead***, 52 A.D.3d 507, 859 N.Y.S.2d 682 [2d Dept., 2008]). The knowledge of the public corporation of the happening of the event is of great importance when making a determination to grant leave. (***Alexander, supra***).

Nonetheless, knowledge of the happening of the accident itself, without more, is insufficient to establish that the public corporation had knowledge of the essential facts constituting the claim. A late notice of claim must provide sufficient notice of the facts underlying the legal theories on which liability is predicated (*see* ***Matter of Castro v. Clarkstown Central School District***, 65 A.D.3d 1141, 885 N.Y.S.2d 508 (2d Dept., 2009); ***Kumar, supra***; ***Matter of Felice v. Eastport/South Manor Central School District***, 50 A.D.3d 138, 851 N.Y.S.2d 218 [2d Dept., 2008]).

Petitioner's notice of claim in this matter is utterly devoid of any facts underlying the legal theories of negligence and the claimed labor law violations. Petitioner alleges therein that the accident occurred in "one of the equipment buildings located at The May Place Site," and he includes a black and white photograph of a building that does not bear any identifiable markings. Furthermore, the Notice of Claim merely states that petitioner "was working on a six (6) foot ladder when he was caused to sustain severe permanent injuries." In view of the fact that petitioner's Notice of Claim did not specify the precise location where the accident occurred, did not describe how the accident occurred, what petitioner was doing at the time, who employed petitioner, or if any witnesses were present, petitioner has failed to meet his burden of demonstrating that respondents were provided with timely notice of the essential facts constituting his claims within ninety (90) days or soon thereafter (*see* ***Kumar, supra***).

Petitioner's reliance on the OSHA Form 301 Injury and Illness Incident Report filled out on the date of the accident as support for his claim that respondents were aware of the circumstances of his accident is undermined by the affidavit of Wayne Stroming. Mr. Stroming, an employee of Electronic Services Solutions, Inc. ("ESS"), completed the

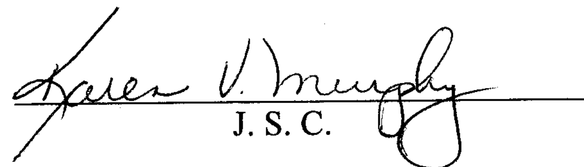
aforementioned report based on the information relayed to him by petitioner, but Mr. Stroming did not mail the report to anyone.[1] Thus, respondents never received the OSHA report, as they aver in their opposition papers.

Based on the foregoing, it is apparent that respondents had no knowledge of petitioner's accident prior to mid-January 2010 and, therefore, were not able to conduct a prompt and proper investigation of this claim. It is the petitioner's burden to establish the lack of prejudice to respondents (*see* ***Felice*, *supra*** at 152). To date, no witnesses are known, and the precise location of the accident at the May Place site has not been specified. As the May Place site was undergoing construction at the time of petitioner's accident, the accident scene has likely changed in appearance and structure since that time, further prejudicing respondents' ability to properly investigate this claim. Moreover, petitioner's claim involves a ladder, which is portable, fungible, and is as yet unidentified. Without access to the ladder in question, respondents cannot adequately defend against petitioner's negligence and labor law violation claims. Finally, petitioner has failed to rebut respondents' assertions that the delay prejudiced their ability to investigate and defend against the claims (*see* ***Godfrey*, *supra***).

Accordingly, petitioner's request for leave to file a late Notice of Claim is denied as to all respondents. In light of the foregoing denial of leave to file a late Notice of Claim, the Court declines at this time to address the merits of petitioner's claims as against the various respondents.

The foregoing constitutes the Order of this Court.

Dated: August 20, 2010
Mineola, N.Y.



J. S. C.

ENTERED
AUG 25 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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[1]It is only through the affidavit of Mr. Stroming that petitioner's employer on the date of the accident has been identified as ESS.