

Darbouze v City of New York

2010 NY Slip Op 32915(U)

September 22, 2010

Sup Ct, NY County

Docket Number: 102477/10

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

Index Number : 102477/2010
DARBOUZE, MARLENE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOTICE OF CLAIM
CAL #38

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

this motion to/for _____

PAPERS NUMBERED

1
2
3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP. 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/22/10
SEP 22 2010

[Signature]
BARBARA JAFFE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER /JUDG. SETTLE ORDER /JUDG.

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
MARLENE DARBOUZE,

Plaintiff,

-against-

Index No. 102477/10
Motion Date: 8/17/10
Motion Seq. No.: 001
Calendar No.: 38

DECISION & ORDER

THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF EDUCATION,

Defendants.

-----X
BARBARA JAFFE, JSC:

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FILED
SEP 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion June 7, 2010 plaintiff moves pursuant to General Municipal Law (GML) § 50-e(5) for an order deeming her notice of claim timely served on defendant City or, in the alternative, granting leave to serve a late notice of claim. City opposes. For the reasons that follow, the motion is denied.

I. ALLEGED FACTS

Plaintiff alleges that on October 15, 2009, she slipped and fell on a wet, broken step while descending a staircase at the main entrance of P.S. 125 on West 123rd Street in Manhattan, and that immediately after, as she lay on the steps, she told the school principal and then the school nurse about her accident, showing each the wet area and broken step. (Affirmation of Jeffrey J. Shapiro, Esq., dated June 7, 2010 [Shapiro Aff.], Exh. D). Later that day, plaintiff completed a

Comprehensive Injury Report for the New York City Department of Education (DOE), stating that while she was walking down the main staircase, she lost her footing and fell down the steps, twisting and possibly breaking her ankle. (*Id.*, Exh. B). A school secretary filed an occurrence report with DOE, in which it is stated that plaintiff had slipped and fallen while exiting the building for lunch, that she had complained of injury to her left ankle, and that EMS transported her to St. Luke's Hospital. (*Id.*, Exh. C).

When she returned to work, two and one-half months after the accident, a colleague told her that there could be legal recourse for her injuries. (*Id.*, Exh. D). She thus retained an attorney on February 8, 2010 who advised that her that the 90-day period to file a notice of claim had expired, but that a late notice of claim might be permitted. (Shapiro Aff.). On February 23, 2010 plaintiff served a late notice of claim on City and DOE (*id.*, Exh. E), and on February 25, 2010, served a summons and complaint (*id.*, Exh. F). This motion was filed on June 7, 2010.

II. CONTENTIONS

Plaintiff contends that City received actual knowledge of her claim when she described her accident to the school secretary and principal and through the DOE reports. She thus argues that City will suffer no prejudice from the late notice, and observes that City has already filed an answer to the summons and complaint. She explains her delay as resulting from her having stayed at home for two and a half months following the accident and from her unawareness of her rights. (Shapiro Aff.).

City contends that the motion must be denied as it is not a proper party, that plaintiff has failed to offer a reasonable excuse for waiting four and a half months past the 90-day deadline before filing this motion, that the knowledge transmitted in plaintiff's conversations with City

employees and the DOE reports cannot be imputed to City, and that it would be prejudiced by the delay in bringing in the petition. (Affirmation of Colin Marville, Esq., dated July 19, 2010).

In response, plaintiff argues that the delay is minimal, that some delay resulted from proceeding by notice of motion rather than by order to show cause, that City has not demonstrated how it would have investigated her case had it received notice earlier, and that the determination of City's legal responsibility is not pertinent to her application. (Reply Affirmation of Jeffrey J. Shapiro, Esq., dated July 28, 2010).

III. ANALYSIS

Pursuant to GML § 50-e(1)(a) and 50-I, 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]). In considering these factors, none is dispositive. (*Barnes v County of Onondaga*, 103 AD2d 624, 628 [4th Dept 1984], *affd* 65 NY2d 664 [1985], *citing Bay Terrace Co-op. Section N v New York State Empls.' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979 [1982]). The standards are flexible, the court may consider all other relevant facts and circumstances (*Beary v City of Rye*, 44 NY2d 398, 407 [1960]), and given the remedial nature of the statute, it is liberally construed (*Porcaro v City of New York*, 20 AD3d 357, 358 [1st

Dept 2005]; *Camacho v City of New York*, 187 AD2d 262 [1st Dept 1992]).

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 it 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]). The mere preparation of the report is insufficient. (*Acosta v City of New York*, 39 AD3d 629 [2d Dept 2007]).

Here, the two accident reports submitted to the DOE reflect only that plaintiff fell down the stairs. There is no mention of any defect or "a causal connection between plaintiff's injuries and acts of negligence on defendants' part" (*Pineda v City of New York*, 305 AD2d 294 [1st Dept 2003]; *see also Webb v New York City Hous. Auth.*, 35 AD3d 313, 314 [1st Dept 2006] [absence of causal connection between injury and negligence left defendant with no knowledge of possible culpability and no reason to investigate]; *Henriques v City of New York*, 22 AD3d 847 [2d Dept 2005] [same]), and plaintiff has not demonstrated that the knowledge set forth in the accident reports and conveyed to the school's employees may be imputed to City, an entity legally distinct

from DOE (*Cf Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied*, 10 NY3d 708 [2008] [City and DOE are distinct legal entities]). Thus, there is insufficient basis upon which to infer that City was alerted to its potential liability.

B. Prejudice

“Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay.” (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). Absent such notice, a delay in serving a notice of claim will “prejudice[] respondent’s ability to investigate . . . identify witnesses, and collect their testimony based on fresh witnesses.” (*Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept 2007]).

Here, plaintiff has not shown that the allegedly defective step is in the same condition as it was when she fell nor, as discussed above, has she shown that City received actual knowledge of the defective condition before the expiration of the 90-year period. Consequently, she has failed to demonstrate that City will not be prejudiced by the delay.

C. Reasonable excuse

Failure to show a reasonable excuse alone is not a ground for denying a petition to serve a late notice of claim where the moving party shows actual knowledge and an absence of prejudice from the delay. (*Matter of Ansong v City of New York*, 308 AD2d 333, 334 [1st Dept 2003]).

Although plaintiff learned on February 8, 2010 that she was required to have filed the notices of claim on or before January 13, 2010, she delayed another 15 days before doing so, did not seek leave to file the late notices until almost four months thereafter, and incurred additional delay by proceeding here by notice of motion instead of by order to show cause. Thus, the

unreasonable delay occurred approximately four and a half months after the deadline passed, and seven and a half months after the accident. (See *Nieves v Girimonte*, 309 AD2d 753, 754 [2d Dept 2003], *lv denied* 309 AD2d 753 [2004] [no explanation as to why petitioners waited five months after identifying defendant before seeking leave to file late notice of claim]; *D'Andrea v City of Glen Cove Public Schools*, 143 AD2d 747, 748 [2d Dept 1989] [after discovering owner of building, plaintiff waited two months before applying for leave]. Although the unreasonable lateness is not, in and of itself, a ground for denying the motion, plaintiff has failed to show that City had actual notice or that it would not be prejudiced.

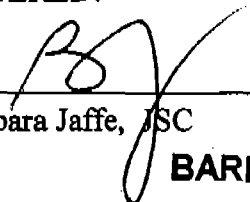
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's application for leave to serve a late notice of claim is denied.

This constitutes the decision and order of the court.

ENTERED:



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

DATED: September 22, 2010
New York, New York

FILED
SEP. 30 2010
NEW YORK
COUNTY CLERK'S OFFICE