Khela v City of New York
2010 NY Slip Op 33033(U)
September 30, 2010
Supreme Court, Queens County
Docket Number: 17240/09
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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HARINDER KHELA,

Plaintiff,

-against-

THE CITY OF NEW YORK and its officers, agents, servants and employees and NEW YORK CITY DEPARTMENT OF TRANSPORTATION and its officers, agents, servants and employees and NEW YORK STATE DEPARTMENT OF TRANSPORTATION and its officers, agents, servants and employees.

Defendants.

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Index No.: 17240/09
Motion Date: 5/24/10
Motion Cal. No.: 1
Motion Seq. No.: 2
[Transferred from Ritholtz, J.]

The following papers numbered 1 to 12 read on this motion by defendants the City of New York and the City of New York s/h/a New York City Department of Transportation for an order, pursuant to CPLR §§ 3211(a)(7), dismissing plaintiff's complaint and all cross-claims against them, or in the alternative, granting summary judgment, pursuant to CPLR § 3212, for failure to comply with the condition precedent of General Municipal Law 50-e and 50-I.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits...	1 - 4
Answering Affidavits-Exhibits..	5 - 7
Reply...	8 - 10
Sur-Reply...	11 - 12

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Harinder Khela ("plaintiff") on July 19, 2008, when he lost control of his motorcycle as he was traveling on the eastbound entrance ramp of the Jackie Robinson Parkway at its intersection with Highland Blvd., due to a defective condition of the roadway. Plaintiff commenced this action on June 29, 2009, and thereafter, filed amended pleadings on July13, 2009, in which plaintiff asserts that a notice of claim

was served upon defendants on August 13, 2008. It is upon the foregoing that defendants the City of New York and the City of New York s/h/a New York City Department of Transportation (the "City") move for an order, pursuant to CPLR § 3211(a)(7), dismissing plaintiff's complaint and all cross-claims against them, or in the alternative, granting summary judgment, pursuant to CPLR § 3212, for failure to comply with the condition precedent of General Municipal Law 50-e and 50-I.

On a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2nd Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2nd Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496, (2nd Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000). The determination to be made is whether plaintiff has a cause of action, not whether one was stated. See, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. See, Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005).

Moreover, it is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, the City contends that the records of the New York City Comptroller and the New York City Law Department did not contain a notice of claim for this action. Prior to the making of this motion, it secured a copy of the August 13, 2008 notice of claim, which indicated that the claim was served upon the New York City Department of Transportation ("DOT"). The City asserts that such service was erroneous, as DOT is not authorized to accept service on behalf of the City. As such, it alleges that "service upon DOT does not constitute proper and timely service upon the City." The City further alleges that since plaintiff had ninety days from July 19, 2008, the date of the accident,

to properly file a notice of claim, plaintiff's time expired on October 17, 2008. Thus, it contends that this action should be dismissed for failure to satisfy the statutory prerequisite to the filing of the pleadings, pursuant to General Municipal Law 50-e and 50-I.

In opposition to the motion, plaintiff states that the notice was sent to DOT via certified mail and signed for on August 15, 2008. He further states that the notice was also sent to defendant NYS Department of Transportation, the Attorney General and the Court of Claims on August 24, 2008. Plaintiff contends that in response to his pleadings, filed upon June 29, 2009, and amended pleadings filed on July 13, 2009, the City served an answer on July 31, 2009, and an amended answer on September 1, 2009, both of which fail to assert an affirmative defense of improper service of the notice, which plaintiff alleges such defense is now waived. He further contends that the answer contained a demand for a bill of particulars and a demand for plaintiff to be deposed, which he responded to and served demands upon the City. He states that on October 20, 2009, after completion of paper discovery and one day after the expiration of the one year and ninety day statute of limitations, he received a phone call from the City requesting a copy of the notice. Plaintiff asserts that the next day, the City informed him that it was not served with the notice and the action should be discontinued. In response thereto, he sent a letter dated October 22, 2009, indicating that service was proper upon DOT; no affirmative defenses regarding defective service of the notice was raised in the City's answer, and was therefore waived; and the timing of the City's query regarding the service of the notice was questionable as it was made one day after the expiration of the statute of limitation.

Plaintiff also asserts that although GML § 50-e (1) mandates service of the notice within ninety days of the accrual of the incident, it further provides under section (3)(a), that service of the notice may be "to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation." Plaintiff further relies upon section (3)©, which provides that if service of the notice is made within the requisite time but in a manner not compliant with this provision, "the service shall be valid if the public corporation against which the claim is made demands that the claimant [] be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received." As such, plaintiff contends that the notice was served upon an attorney regularly engaged in the representation of the public corporation, the notice was sent to and signed for by the legal department, and the notice was not returned. Moreover, plaintiff attaches a memorandum from the City's Law Department setting forth the procedure to have this case considered for early settlement by the Early Intervention Unit of the Tort Division. In light of the foregoing, plaintiff asserts that the City should be estopped from making the instant argument and the motion should be denied. This Court agrees.

General Municipal Law § 50-e, entitled, "Notice of claim," states, in relevant part, the following:

> 1. When service required; time for service; upon whom service required.
>
> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.
>
> (b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

It is well-settled that service of a notice of claim within 90 days after accrual of the claim is a condition precedent to commencing an action against the City. See, White v. New York City Housing Authority, 38 A.D.3d 675 (2nd Dept. 2007); Urena v. New York City Health and Hospitals Corp., 35 A.D.3d 446 (2nd Dept. 2006). Here, this Court finds that the City should be estopped from alleging that plaintiff failed to timely file a notice of claim. It is particularly peculiar to this Court that the City inquires about the timely filing of the notice of claim one day after the expiration of the statute of limitations, all while interposing responsive pleadings, making demands and conducting discovery, and advising of early settlement considerations. As appropriately relied upon by plaintiff and, as stated by the Court of Appeals in Bender v. New York City Health & Hospitals Corp., 38 N.Y.2d 662, 668 (1976):

> We believe that where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised. (Citations omitted) The equitable bar to a defense may arise by virtue of positive acts, or omissions where there was a duty to act. By applying the doctrine of equitable estoppel to notice of claim situations, the courts may insure that statutes like section 50-e of the General Municipal Law, do not

> become 'a trap to catch the unwary or the ignorant' (citations omitted).

See, generally, Gorman v. Town of Huntington, 12 N.Y.3d 275 (2009); Brown v. City of New York, 264 A.D.2d 493 (2nd Dept. 1999); compare, Wade v. New York City Health and Hospitals Corp., 16 A.D.3d 677 (2nd Dept.2005).

Accordingly, the motion by defendants the City of New York and the City of New York s/h/a New York City Department of Transportation for an order, pursuant to CPLR §§ 3211(a)(7), dismissing plaintiff's complaint and all cross-claims against them, or in the alternative, granting summary judgment, pursuant to CPLR § 3212, for failure to comply with the condition precedent of General Municipal Law 50-e and 50-I, is denied in its entirety.

Dated: September 30, 2010

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J.S.C.