

Rivera v City of New York

2010 NY Slip Op 33235(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 110118/10

Judge: Barbara Jaffe

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

PRESENT: ~~BARBARA JAFFE~~

J.S.C.

Justice

PART

~~5~~ 5

RIVERA, JASLINE

INDEX NO.

110118/10

MOTION DATE

- v -
THE CITY OF NEW YORK

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for

lv to file late N/C

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits

1

Replying Affidavits

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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 1415).

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/9/10

NOV 09 2010

BJ
BARBARA JAFFE J.S.C.

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

JASMINE RIVERA,

Petitioner,

-against-

Index No. 110118/10
Motion Date: 10/19/10
Motion Seq. No.: 001

DECISION & JUDGMENT

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
and ANGELO COLON,

Respondents,

-----X

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

BARBARA JAFFE, JSC:

For petitioner:
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For respondents:
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By order to show cause dated July 28, 2010, petitioner seeks, pursuant to General Municipal Law (GML) § 50-e(6), an order granting her leave to serve respondents with a late notice of claim. Respondents City and New York City Department of Recreation (collectively, City) oppose. For the reasons that follow, the motion is denied.

Petitioner, employed by respondents at the time of the incident, alleges that “on or about March 17, 2010 and continuing until the middle of May, 2010 . . . [she] was sexually harassed, abused and assaulted” by respondent Angelo Colon, then working for respondents as a supervisor, at the Howard Bennett Playground at West 135th and West 136th Streets between

Lenox Avenue and Fifth Avenue.” (Affirmation of Jay H. Tanenbaum, Esq., dated July 28, 2010, Exh. A). In her proposed notice of claim, she alleges, *inter alia*, that respondents were “careless, reckless and otherwise grossly negligent in their failure to properly investigate and/or evaluate or screen” those employed at the worksite, and in failing to provide guidance and supervision at the worksite, failing to provide a safe work environment, and failing to prevent her assault and abuse. (*Id.*).

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]).

Petitioner offers no reasonable excuse in serving this notice of claim late, save for a conclusory allegation of fear of retaliation, which she improperly raises for the first time in her reply. (*See Formisano v Eastchester Free School Dist.*, 59 AD3d 543, 544 [2d Dept 2009] [fear of retaliation not reasonable excuse]; *Perre v Town of Poughkeepsie*, 300 AD2d 379, 380 [2d Dept 2002] [in granting leave to serve late notice of claim, court improperly relied on information first raised in reply papers]; *Allen v Westchester Cty Health Care Corp.*, 268 AD2d 520, 521 [2d Dept 2000] [contentions raised for first time in reply brief not considered]).

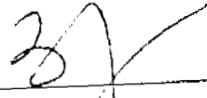
Although petitioner did not inordinately delay in seeking leave, her allegations are vague and conclusory, and she does not explain how the March 17 violation was “continuing.” (*See Kumar v City of New York*, 52 AD3d 517, 518 [2d Dept 2008] [notice of claim served 17 days late did not specify how accident occurred]; *Narcisse v Incorporated Village of Central Islip*, 36 AD3d 920, 921 [2d Dept 2007] [proposed notice of claim not specific enough to provide knowledge]; *Powell v City of New York*, 32 AD3d 227, 228 [1st Dept 2006] [for claim of malicious prosecution, “prejudice is exacerbated . . . by the vague and conclusory nature of petitioner’s notice of claim”]; *Rosado v Trinity Church*, 221 AD2d 250 [1st Dept 1995], *lv denied* 88 NY2d 806 [1996] [failure to provide detailed description of defect which allegedly caused plaintiff’s injuries or specific address of accident scene constituted failure to give defendant sufficient knowledge of events underlying claim]). Thus, petitioner has not shown that respondents have actual knowledge of the claim, and respondents are thereby prejudiced by an inability to conduct a proper investigation. (*Powell*, 32 AD3d at 228). Having also failed to demonstrate a reasonable excuse for the delay, petitioner has not established sufficient grounds for serving late notice. (*Gitis v City of New York*, 68 AD3d 489, 490 [1st Dept 2009], *lv denied*, 14 NY3d 712 [2010] [Supreme Court improperly granted leave to file late notice where petitioner failed to demonstrate actual knowledge, absence of prejudice, or reasonable excuse for delay]).

Accordingly, it is hereby

ORDERED, that the petition for leave to serve a late notice of claim is denied; and it is further

ADJUDGED, that the proceeding is dismissed.

This constitutes the decision and judgment of the court.



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

DATED: November 9, 2010
New York, New York

NOV 09 2010

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