

**Matter of Tri-State Consumer Ins. Co. v Long Is.
Power Auth.**

2010 NY Slip Op 33373(U)

November 29, 2010

Supreme Court, Nassau County

Docket Number: 008222/10

Judge: Randy Sue Marber

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AMENDED SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

In the matter of the application of TRI-STATE
CONSUMER INSURANCE COMPANY a/s/o
ROSEMARY A. COROZZA,

AMENDED ORDER

Petitioner,

Index No.: 008222/10

Motion Sequence...01

-against-

Motion Date... 08/17/10

XXX

LONG ISLAND POWER AUTHORITY,

Respondent.

_____ X

Papers Submitted:

Notice of Petition.....X

Affirmation in Opposition.....X

Affirmation in Reply.....X

Upon the foregoing papers, the application by the Petitioner, TRI-STATE
CONSUMER INSURANCE COMPANY a/s/o ROSEMARY A. CAROZZA (“TRI-
STATE”), seeking an Order, pursuant to General Municipal Law § 50-e (5), granting the
Petitioner leave to serve a late Notice of Claim, is decided as hereinafter provided.

This matter arises out of a subrogation claim brought by the Petitioner, TRI-
STATE for property damage sustained to its insured, ROSEMARY A. CAROZZA’s vehicle
on or about December 27, 2009. The property damage was allegedly caused when TRI-

STATE's insured's vehicle struck a pole that was lying across a portion of Commack Road. According to the Petitioner's counsel, on March 12, 2010, a Notice of Claim was timely served upon the County of Suffolk. On March 26, 2010, the Petitioner's counsel received correspondence from the County of Suffolk indicating that it did not own, operate or maintain the subject pole and that the Long Island Power Authority ("LIPA") was responsible for any damage. The Petitioner claims that since the correspondence from the County of Suffolk was received on or about the 90th day after the occurrence giving rise to the claim, a timely Notice of Claim could not be served upon LIPA. Thereafter, on April 28, 2010, the Petitioner filed its Petition with the Nassau County Clerk's Office. This application, for leave to file a late Notice of Claim, was received by the Supreme Court on May 11, 2010.

General Municipal Law § 50-e (5) provides for the filing of a Notice of Claim with the public corporation who may be liable for the happening of an incident. Pursuant to General Municipal Law § 50-e (1), a Notice of Claim must be served within ninety (90) days after the claim arises. The trial court, in its sound discretion, may grant leave to file a late Notice of Claim within a reasonable time after the expiration of the 90-day period and within one year after the happening of the event upon which the claim is based. In making its determination, the trial court must focus on whether the movant has demonstrated a reasonable excuse for its failure to file a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days from

its accrual or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. *Acosta v. City of New York*, 39 A.D.3d 629 (2nd Dept. 2007). The knowledge of the public corporation of the happening of the event is of great importance when making a determination to grant leave. *Alexander v. Board of Education*, 18 A.D.3d 654 (2nd Dept. 2005).

In support of its application, the Petitioner's counsel claims that LIPA will suffer no prejudice if the instant application is granted. Petitioner's counsel further contends that LIPA must have had actual notice of the occurrence giving rise to the claim because one of its power transmission poles was knocked down. Counsel for the Petitioner also contends that this application is filed as a matter of right as there was only a short delay after the time to file the Notice of Claim expired and was made within one year and ninety days from the occurrence.

In opposition to the Petition, the Respondent contends that the Petitioner's proposed claim against LIPA is without merit as it does not own, operate, maintain or control the pole. In support of this contention, the Respondent submitted the affidavit of William B. Chancellor, an emergency serviceman who responded to a police department call for the pole that was lying across Commack Road on the morning of December 27, 2009. *See* Affidavit of William B. Chancellor, attached to the Respondent's Affirmation in Opposition as Exhibit "E". Mr. Chancellor states in his affidavit that upon inspection of the utility pole, it was discovered that the pole bore a Verizon number "153 S" and an inspection of the wires

revealed that the wires attached to the pole were Verizon trunk line cables. *Id.* Mr. Chancellor states that the application of the Petitioner should be denied as the pole and the wires involved in the incident were not owned by, or the responsibility of LIPA. *Id.*

The Respondent also argues that the Petition should be denied as the Petitioner's counsel failed to explain or justify the failure to serve the Notice of Claim within the applicable 90-day time period prescribed by the statute. The Respondent contends that the County of Suffolk's denial letter should not serve as a sufficient excuse for the Petitioner's failure to timely file a Notice of Claim. In that regard, the Respondent claims that the Petitioner's insured's accident report indicates that the pole involved in the accident was owned by LIPA. *See* Accident Report, dated December 27, 2009, attached to the Respondent's Affirmation in Opposition as Exhibit "E". As such, it is the Respondent's position that the Petitioner does not have a reasonable excuse for not timely serving a Notice of Claim upon LIPA, nor is there any explanation in the Attorney Affirmation regarding a reasonable excuse.

In reply, the Petitioner's counsel argues that the application should be granted as there is no prejudice to the Respondent because it had actual knowledge of the facts of the occurrence as evidenced by the affidavit of Mr. Chancellor. The Petitioner's counsel also contends that Mr. Chancellor's affidavit indicating that LIPA does not own the pole does not warrant a denial of the Petition as the merits of the claim are not a factor to be considered on this application. Counsel for the Petitioner further argues that there are questions of fact as

to the ownership of the pole and that this ultimate issue should not be decided in this proceeding.

At the outset the Court notes that, in support of the application, only an attorney affirmation is submitted with accompanying exhibits. There is no verified petition or affidavit submitted by the Petitioner attesting to personal knowledge of the alleged facts. Representations made solely by counsel have no evidentiary value.

The Court finds that the Petitioner failed to set forth a reasonable excuse for the delay in serving the Notice of Claim upon the public corporation. While misidentifying a defendant may in some circumstances be a reasonable excuse, the Court declines to accept that the delay is excusable in this instance. *See National Surety Corp. v. Town of Greenburgh* (2nd Dept. 1999). In *National Surety Corporation*, the sewer system at issue was owned, operated and controlled by the Town of Greenburgh. Further, any delay in serving the Notice of Claim on the Town of Greenburgh was attributable to the attempt to ascertain the identity of the public corporation against which the claim had to be served.

To the contrary, here, the Respondent submitted proof that Verizon, and not LIPA, is the owner of the pole that allegedly caused the accident. Moreover, the Petitioner made no efforts to ascertain the proper defendant upon whom the Notice of Claim should be served. It appears from the documentation presented by the Respondent that the entity that owned, operated and/or controlled the pole and wires which caused the damage to the Petitioner's insured's vehicle was easily ascertainable. This is so especially in light of the

fact that the accident report indicates the believed owner to be LIPA. *See* Accident Report, dated December 27, 2009, attached to the Respondent's Affirmation in Opposition as Exhibit "E". *Compare Samad-Matias v. City of New York*, 792 N.Y.S.2d 854 (N.Y. County 2005). That, in conjunction with the Respondent's evidence that it was not the owner and/or operator of the pole or wires, warrants denial of the Petitioner's application to file and serve a late Notice of Claim as there is no reasonable excuse for the delay. Indeed, the Petitioner's papers are silent as to whether there was a reasonable excuse for the delay. The reply papers also do not rebut the Respondent's contention that Petitioner should have known to serve a Notice of Claim upon LIPA. Most notably, the Petitioner's counsel does not affirmatively dispute the Respondent's contention that Verizon is the owner and/or operator of the pole and wires. He merely makes a blanket assertion that an issue of fact exists with respect to ownership and urges this Court to permit late service of the Notice of Claim.

Moreover, while the Petitioner "is not required to establish conclusively the merits of the claim at this stage in the litigation", there must, at the very least, be sufficient facts to establish the reasonableness of the claim. *See Ali ex rel. Ali v. Bunny Realty Corp.*, 253 A.D.2d 356, (1st Dept. 1998); *see also Matter of Logan v. City of Albany*, 154 A.D.2d 861, 862 (3rd Dept. 1989); *see also, Weiss v. City of New York*, 237 A.D.2d 212 (1st Dept. 1997). Here, the Petitioner has failed to set forth any facts that establish the reasonableness of the underlying claim in light of the proof submitted by the Respondent that LIPA did not own, maintain or operate the pole or wires.

Accordingly, the Court, in its sound discretion, **DENIES** the Petitioner's application to file a late Notice of Claim.

The Petitioner's remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the Petition to file a late Notice of Claim is **DISMISSED**.

This constitutes the decision and Order of the court.

DATED: Mineola, New York
November 29, 2010



Hon. Randy Sue Marber, J.S.C.

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ENTERED
DEC 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE