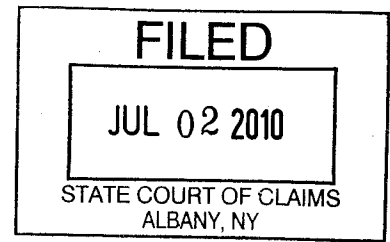


Fernandez v State of New York
2010 NY Slip Op 33994(U)
June 21, 2010
Court of Claims
Docket Number: M-77831
Judge: James J. Lack
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STATE OF NEW YORK COURT OF CLAIMS

RAMON FERNANDEZ and JOHANNY FERNANDEZ,

Claimants,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. None
Motion No. M-77831

Defendant.

BEFORE: HON. JAMES J. LACK
Judge of the Court of Claims

APPEARANCES: For Claimants:
Dell, Little, Trovato & Vecere, L.L.P.
By: Keri A. Wehrheim, Esq.

For Defendant:
Andrew M. Cuomo, New York State Attorney General
By: John M. Shields, Assistant Attorney General

This is a motion by Ramon Fernandez and Johanny Fernandez (hereinafter "movants") to ask this Court to deem their Notice of Intention to be a claim pursuant to Court of Claims Act §10(8)¹.

¹The following papers were read and considered on movants' motion: Notice of Motion dated February 8, 2010 and filed February 10, 2010; Affirmation in Support of Keri A. Wehrheim, Esq. with annexed Exhibits A-F dated February 8, 2010 and filed February 10, 2010; Affirmation in Opposition of John M. Shields, Esq. dated February 23, 2010 and filed March 8, 2010; Affirmation in Reply of Keri A. Wehrheim, Esq. dated March 9, 2010 and filed March 12, 2010.

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According to the motion, on February 14, 2007, at approximately 3:00 p.m., Ramon Fernandez was a pedestrian in the parking area of Stony Brook University Hospital in Stony Brook, New York, when he was caused to slip and fall. Movants allege the State of New York (hereinafter "State") was negligent in failing to make the area safe for pedestrians; failing to provide a proper walkway; failing to warn of dangerous conditions and in failing to remedy any of the defective and dangerous conditions, in particular snow and ice.

On May 15, 2007, movants served a Notice of Intention by personal service upon an Assistant Attorney General (movant's Exhibit A). In addition, movants filed a copy of the Notice of Intention on May 15, 2007, in the Clerk's Office by fax and paid the filing fee. The State does not contest that it was served with the Notice of Intention, however, the State does challenge its adequacy.

Court of Claims Act §10(8)(a) states:

A claimant who timely serves a notice of intention but who fails to timely serve or file a claim may, nevertheless, apply to the court for permission to treat the notice of intention as a claim. The court shall not grant such application unless: it is made upon motion before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules; the notice of intention was timely served, and contains facts sufficient to constitute a claim; and the granting of the application would not prejudice the defendant.

The State opposes the motion on the ground that the Notice of Intention does not meet the requirements of Court of Claims Act §11.

The requirements of the Court of Claims Act are jurisdictional in nature and must be strictly construed (*Lurie v State of New York*, 73 AD2d 1006, *aff'd* 52 NY2d 849). The purpose of these

requirements is to give the State prompt notice of an occurrence and an opportunity to investigate the facts and prepare a defense. There must be sufficient detail to enable the State to investigate (*Schwartzberg v State of New York*, 121 Misc 2d 1095, *aff'd* 98 AD2d 902). Pursuant to the Court of Claims Act, a claim must include the time when and place where the claim arose, the nature of the claim, items of damage or injuries sustained.

The Notice of Intention attached to the motion as Exhibit A describes the location of the accident as the “parking area of Stony Brook University Hospital” and a “pedestrian roadway”. Given the size of Stony Brook University Hospital, the existence of more than one multi-level parking garage, other parking areas and numerous pathways, the Court finds the description of the location to be less than adequate to satisfy Court of Claims Act §11. The original document does not include all that is essential to constitute a claim, and thus, the Court is without jurisdiction (*see Artale v State of New York*, 140 AD2d 919; *see also, Grande v State of New York*, 160 Misc 2d 383).

In the alternative, movants ask the Court for permission to file a late claim pursuant to Court of Claims Act §10(6).

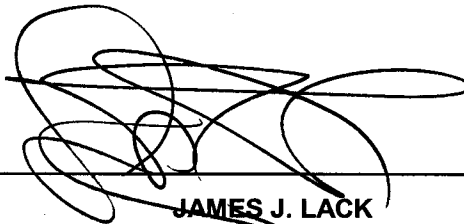
In determining a motion seeking permission to file a late claim, the Court must consider the following six enumerated factors listed in Court of Claims Act §10(6): (1) whether the delay in filing was excusable; (2) whether the State had notice of the essential facts constituting the claim; (3) whether the State had an opportunity to investigate the circumstances underlying the claim; (4) whether the failure to serve and file a timely claim or serve a timely notice of intention resulted in substantial prejudice to the State; (5) whether the movant has another available remedy; and (6) whether the claim appears to be meritorious. The Court in the exercise of its discretion balances these factors, and, as a general rule, the presence or absence of any one factor is not dispositive (*Bay*

Terrace Coop. Section IV v New York State Employees' Retirement System Policemen's and Firemen's Retirement System, 55 NY2d 979).

The Court has reviewed the parties' papers in support of and in opposition to the motion.

Based on the foregoing, the Court concludes that the statutory factors favor movants' application and, therefore, grants permission to file a late claim (*Jomarron v State of New York, 23 AD3d 527*). Movants are directed to serve and file the proposed claim within forty-five (45) days of the filing date of this Decision and Order in accordance with §§10, 11 and 11-a of the Court of Claims Act.

Hauppauge, New York
June 21, 2010

A handwritten signature in black ink, consisting of several overlapping loops and lines, positioned above a horizontal line.

JAMES J. LACK
Judge of the Court of Claims