

Torres v State of New York

2010 NY Slip Op 34137(U)

August 5, 2010

Court of Claims

Docket Number: Claim No. None

Judge: Norman I. Siegel

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This opinion is uncorrected and not selected for official publication.

Synopsis

This is a motion brought by *pro se* claimant for permission to file a late claim. Claimant fails to attach a proposed claim to the moving papers; however, claimant references a prior claim filed with the Court in all his moving papers. It appears to the Court that the contents of the claimant's moving papers is a response to defendant's affirmative defense and that claimant's previously filed claim is the proposed claim under this motion. The defendant opposes the motion on the basis that the proposed claim is not attached to the moving papers and also on the grounds that the defendant had neither notice nor opportunity to investigate and is thereby prejudiced, and that the delay was not excusable. The Court, after reviewing the claimant's submissions, is satisfied that the relief is appropriate in this case. The Court grants claimant permission to file a late claim.

Case information

UID: 2010-042-518
Claimant(s): RICARDO TORRES
Claimant short name: TORRES
Footnote (claimant name) :
Defendant(s): STATE OF NEW YORK
Footnote (defendant name) :
Third-party claimant(s):
Third-party defendant(s):
Claim number(s): NONE
Motion number(s): M-78043
Cross-motion number(s):
Judge: NORMAN I. SIEGEL
Claimant's attorney: RICARDO TORRES, *PRO SE*
HON. ANDREW M. CUOMO
Defendant's attorney: Attorney General of the State of New York
By: G. LAWRENCE DILLON, ESQ.
Assistant Attorney General
Third-party defendant's attorney:
Signature date: August 5, 2010
City: Utica
Comments:
Official citation:
Appellate results:
See also (multcaptioned case)

Decision

The court has considered the following papers on *pro se* claimant's motion for permission to file a late claim:

1. Notice of Motion, filed March 19, 2010 (referencing Claim No. 118017)
2. Affidavit of Ricardo Torres, sworn to March 17, 2010 (referencing Claim No. 118017)
3. Letter of G. Lawrence Dillon, Esq., dated April 28, 2010
4. Letter from Chambers, dated April 29, 2010
5. Opposition affirmation of G. Lawrence Dillon, Esq., dated May 17, 2010
6. Exhibit A, annexed to the opposition affirmation
7. Letter of *pro se* claimant, dated May 1, 2010 (referencing Claim No. 118017)

8. Claimant's affidavit of service, sworn to March 17, 2010 (referencing Claim No. 118017)
9. DOCS Disbursement or Refund Request Form
10. Affidavit of claimant, sworn to May 4, 2010 (referencing Claim No. 118017)
11. Notice of Motion, dated May 4, 2010, attached to claimant's affidavit and referencing Claim No. 118017

This matter comes before the court on the *pro se* claimant's motion for permission to file a late claim. As can be seen from the list of submissions, each submission by claimant on this motion references Claim No. 118017. Claim No. 118017 is a pending claim that was filed by the claimant on February 10, 2010. At all times relevant to that claim, claimant resided at the Mohawk Correctional Facility's Walsh health unit. In Claim No. 118017, the claimant alleges that he lost his left leg and requires a prosthetic leg and/or a wheelchair to ambulate. However, he states that he must have the use of the wheelchair to safely access the showers. According to that claim, on October 13, 2009 claimant was informed that Dr. Salvana, defendant's employee, had directed that claimant's wheelchair was to be taken from him. On November 7, 2009 the claimant was injured while trying to exit the showers on his prosthetic leg, having been denied use of the wheelchair. Claim No. 118017 followed. The claim sets forth numerous causes of action, including negligence, gross negligence, violations of various laws, including the Americans with Disabilities Act, and violations of assorted state laws and regulations regarding inmate safety. The State interposed an answer to that claim, in which it alleged, as an affirmative defense, that "the claim is untimely in that neither the claim nor a notice of intention was served within ninety (90) days of the accrual of the claim as required by Court of Claims Act Sections 10 and 11."

While claimant's moving papers fail to attach a proposed claim or any supporting affidavits, it is clear, both from the caption of the moving papers (specifically referencing Claim No. 118017) and the contents of the moving papers that the motion is a response to the defendant's affirmative defense. It is also clear that claimant's previously-filed claim is the "proposed" claim. It is reasonable that claimant would not see the need to attach a proposed claim to the motion when the motion refers to a specific claim previously served on the defendant and filed with the Court. While the State opposes the motion on the basis that the proposed claim is not attached to the moving papers, the Court accepts the filed Claim No. 118017 as the proposed claim, even though the proposed claim fails to accompany the moving papers as required by Section 10 (6) of the Court of Claims Act (*Cf. Harris v State of New York*, 38 AD3d 144).

The State also opposes the motion on the grounds that the defendant had neither notice nor opportunity to investigate and is thereby prejudiced, and that the delay was not excusable.

Court of Claims Act § 10 (6) provides, in relevant part, that:

[i]n determining whether to permit the [late] filing of a claim . . . , the court shall consider, among other factors, whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy.

The presence or absence of any one factor is not dispositive in the court's consideration of a late claim motion. (*See Bay Terrace Coop. Section IV v New York State Employees' Retirement System Policemen's & Firemen's Retirement System*, 55 NY2d 979; *Rice v State of New York*, UID No. 2006-028-598, Claim No. NONE, Motion No. M-71150, October 18, 2006, Sise, P.J.). Additionally, the court is afforded broad discretion in its determination and consideration of the statutory factors (*Matter of Gonzalez v State of New York*, 299 AD2d 675; *Doe v State of New York*, UID No. 2004-028-512, Claim No. NONE, Motion No. M-67159, March 10, 2004, Sise, J.).

EXCUSABLE DELAY

According to claimant, the original claim was received by the Attorney General on February 9, 2010. Claimant considers the cause of action to have accrued on November 7, 2009. This motion was filed on March 19, 2010 and, according to claimant's affidavit of service, the motion was served by mail upon the Attorney General on March 17, 2010.

Claimant acknowledges that the original claim was not timely served, though he submitted the request for mailing to the Department of Correctional Services staff on January 26, 2010. For reasons unknown to him, the staff delayed service until February 8, 2010.

While the claim, as originally served, was untimely only by a matter of days, nevertheless it was untimely. However, as claimant points out, the claim and this motion were served well within the statutes of limitations applicable to the action.

Claimant's status as an incarcerated *pro se* litigant does not relieve him of the statutory requirements of proper service. As the court noted in *Mead v State of New York*, UID No. 2009-044-551, Claim No. 115190, Motion No. M-76663, September 9, 2009, Schaewe, J.:

[a] claimant's ignorance of the requirements of the Court of Claims Act, and the mere fact of his or her incarceration, are not adequate excuses for the delay in timely serving and filing a claim (*see Matter of Sandlin v State of New York*, 294 AD2d 723 [2002], *lv dismissed* 99 NY2d 589 [2003]; *Plate v State of New York*, 92 Misc 2d 1033 [1978]).

Accordingly, this factor does not favor the claimant.

NOTICE, OPPORTUNITY TO INVESTIGATE AND PREJUDICE

The statutory factors of notice of essential facts, opportunity to investigate and substantial prejudice are generally considered together (*Doe v State of New York*, UID No. 2004-028-512, Claim No. NONE, Motion No. M-67159, March 10, 2004, Sise, J.; *Yamaoka v State of New York*, 10 Misc 3d 1059 [A]).

As noted previously, the Attorney General states that the State had neither notice or an opportunity to investigate and further states that "[w]ithout an ability to investigate, having no notice, the State is clearly prejudiced by the application to late file a claim." No evidentiary materials or facts are offered in support of this conclusory statement.

Claimant points out that the claim was served within days after the expiration of the 90-day time period, that he also filed a grievance on the issue, that medical staff provided him with treatment following the incident and "took an injury report."

The Court is satisfied, on the facts before it, that the State had notice of the incident, an opportunity to investigate and fails to demonstrate that it has been prejudiced by this application to file a late claim.

As the Court stated in *Matter of Smith v State of New York*, 63 AD3d 1524 at 1525, in ruling on the appeal of a denial of permission to file a late claim:

[i]n opposition to the application, respondent [State of New York] submitted only the affirmation of an attorney with no personal knowledge of the facts (*see Matter of Powell v State of New York*, 187 AD2d 848 [1992]). Respondent failed to establish that any effort was made to determine whether it had notice of the accident or an opportunity to investigate, nor did respondent substantiate its conclusory allegations that it would be substantially prejudiced as the result of claimants' delay (*see id.*; *Matter of Donaldson v State of New York*, 167 AD2d 805, 806 [1990]).

The consideration of these three factors favors the claimant.

MERITORIOUS CLAIM

This factor is often considered the most decisive, since "it would be a futile gesture to permit a claimant to file a claim which is legally defective and thus subject to immediate dismissal" (*Terrell v Green Haven Correctional Facility*, Ct Cl, June 14, 1977, Rossetti, J.; *see Matter of Santana v New York State Thruway Authority*, 92 Misc 2d 1, 10).

Defendant offered no opposition to claimant's assertions that the claim is meritorious, despite the fact that it was clear that Claim No. 118017 was the proposed claim. While not all aspects of the claim, if it is allowed to proceed, may survive subsequent motion practice, the claim generally appears to be meritorious. Though the burden of demonstrating a meritorious claim falls upon the claimant, nevertheless:

a proposed claim meets this standard if it is not patently groundless, frivolous, or legally defective, and upon consideration of the entire record, there is cause to believe that a valid cause of action exists (*Matter of Santana v New York State Thruway Authority*, 92 Misc 2d 1, 11).

This factor favors the claimant.

ALTERNATIVE REMEDY

Claimant argues that he has no alternative remedy. The defendant does not suggest that any alternative remedy exists.

Having reviewed the claimant's submissions and considered them in the light of the statutory factors applicable to a motion for permission to file a late claim, the court is satisfied that relief is appropriate in this case.

Permission to file a late claim, pursuant to Court of Claims Act Section 10 (6), is granted. Claimant is directed to serve and file a claim in accordance with the Court of Claims Act Sections 11 and 11-a within sixty (60) days of the filing date of this decision and order.

August 5, 2010

Utica, New York

NORMAN I. SIEGEL

Judge of the Court of Claims

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