

Lopez v City of New York

2011 NY Slip Op 30311(U)

January 18, 2011

Sup Ct, Queens County

Docket Number: 29910/10

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Altagracia Lopez,

Petitioner,

- against -

The City of New York,

Respondent.

-----X

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Motion
Date: 12/14/10

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Motion Seq. No.: 1

The following papers numbered 1 to 4 read on this application for leave to serve a late notice of claim.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4

Upon the foregoing papers it is ordered that the application is decided as follows:

Application by petitioner for leave to file a late notice of claim is denied, notwithstanding the absence of any opposition.

As a preliminary matter, since there was no action pending at the time petitioner sought leave to serve a late notice of claim, she was required to proceed by way of a special proceeding (see Billone v. Town of Huntington, 188 AD 2d 526 [2nd Dept 1992]). A special proceeding is commenced by service of a notice of petition and petition or an order to show cause and petition (see CPLR 304, 403[b]). The instant application was made, improperly, by notice of motion. Even were the instant application properly made, it must still be denied subsstantively.

Petitioner allegedly sustained injuries as a result of a motor vehicle accident in which the vehicle she was operating collided with another vehicle at the intersection of Jamaica Avenue and Van Wyck Expressway in Queens County on June 6, 2010. Plaintiff's claim against the City is that the accident was caused by a

malfunctioning traffic light controlling the intersection.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioner served the City with the instant order to show cause seeking to file a late notice of claim on November 19, 2010, 2½ months past the 90-day deadline for filing a notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to proffer an adequate excuse for her failure to serve a timely notice of claim. Counsel for plaintiff contends that through an oversight he did not properly note the deadline for service of a notice of claim. However, law office failure does not constitute a reasonable excuse for the failure to serve a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d 422 [2nd Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2nd Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2nd Dept 2000]). Therefore, any delay in seeking leave to file a notice of claim attributable to the failings of counsel's office does not constitute a reasonable excuse as a matter of law.

Petitioner has also failed to demonstrate that the City acquired actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter by virtue of the police accident report prepared by the officer who responded to the scene of the accident. The accident report stated, inter alia, "Traffic control device was not in proper working order." This notation, plaintiff argues, was sufficient to apprise

the City of plaintiff's claim that the accident was caused by a non-functioning traffic control device. Even if, arguendo, such notation in the accident report were sufficient information to connect the accident to negligence on the part of the City, the accident report would still not be sufficient to impart actual notice to the City where there was no evidence that it was "ever filed with or otherwise brought to the attention of the officer of the City designated by law to accept service of a notice of claim" (Caselli v. City of New York, 105 AD 2d 251, 255 [2nd Dept 1984]) and where no further investigation by the City was conducted concerning the accident.

A police accident report, in and of itself, does not constitute actual notice to the municipality of the essential facts constituting the claim (see State Farm Mut. Auto. Ins. Co. v New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]; Dominquez v Continental Ins. Co. v City of Rye, 257 AD 2d 573 [2nd Dept 1999])). The filing of a police accident report may be considered as comprising part of the information constituting actual notice to the municipality where the report connects the accident to negligence on the part of the municipal agency and where there was further investigation conducted by the City (see Hardayal v City of New York, 281 AD 2d 593 [2nd Dept 2001]; Caselli v. City of New York, supra).

A notice of claim involving a City agency must be served upon the Corporation Counsel of the City of New York or the New York City Comptroller (see Knox v. NYC Bureau of Franchises, 48 AD 3d 756 [2nd Dept 2008]). Service upon a City agency is ineffective to satisfy the notice of claim requirement (see id.). The accident report that was prepared by the police officer who responded to the accident was a Department of Motor Vehicles MV-104AN Police Accident Report (NYC) form. Pursuant to §603 of the Vehicle and Traffic Law, the police must file the accident report with the Commissioner of Motor Vehicles. Pursuant to the Police Accident Report Manual published by the New York State Department of Motor Vehicles, the New York City Police Department is to send accident reports to the DMV's Accident Records Bureau in Albany. No evidence has been proffered to show that the report was filed or brought to the attention of the Corporation Counsel or the Comptroller (see Caselli v. City of New York, supra).

Therefore, the filing of an accident report with the DMV did not impart knowledge of the claim to the City so as to enable the City to conduct a proper investigation, unless additional investigations were conducted and/or reports filed that could be viewed as having put the City on reasonable notice of the facts underlying the claim. The notice of claim requirement would be

rendered academic if the mere filing of a routine police accident report with the DMV were alone sufficient to excuse the claimant from serving a timely notice of claim in all motor vehicle accident cases. Petitioner has failed to proffer any evidence that the City conducted any other investigation of the accident or that any other reports were filed so as to apprise it of the facts underlying the claim. Although the operator of the other vehicle, which was a City vehicle, also commenced an action against plaintiff and the City and served the City with a summons and complaint alleging property damage arising from the accident in question, no proof was shown that the City conducted an investigation pursuant thereto. In any event, said summons and complaint were not served until October 5, 2010, past the 90-day deadline for filing a notice of claim, and, thus, could not serve as timely actual notice.

Although plaintiff also alleges that the City would not be prejudiced by late service of a notice of claim, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant motion where plaintiff has failed to demonstrate either that there was a reasonable excuse for its failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the statutory 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

In any event, plaintiff has failed to show that the City would not suffer prejudice by the delay. It is the burden of the claimant seeking leave to serve a late notice of claim to show lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]). Plaintiff's only basis for her contention that the City would not suffer prejudice is the unmeritorious argument that the police accident report imparted actual knowledge of the facts underlying the claim. It is the opinion of this Court that the passage of 5½ months from the date of the accident and 2½ months from the expiration of the 90-day period for filing a notice of claim to the making of the instant application has prejudiced the City's ability to investigate the incident effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]). Petitioner's contention that the condition was not a transitory one "does not negate the danger that the passage of time prevented an accurate reconstruction of the circumstances existing at the time the accident occurred" (Rios v. City of New York, 180 AD 2d 801, 802 [2nd Dept 1992]).

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for

leave to serve a late notice of claim without an adequate excuse by counsel for the delay, and absent the receipt by the City of timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Accordingly, the application is denied.

Dated: January 18, 2011

KEVIN J. KERRIGAN, J.S.C.