

Allstate Ins. Co. v County of Nassau

2011 NY Slip Op 31631(U)

June 9, 2011

Supreme Court, Nassau County

Docket Number: 3641/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ALLSTATE INSURANCE COMPANY as subrogee of
DAVID KIRKHAM and KATHLEEN KIRKHAM,

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioner,

Index No.: 3641/11
Motion Seq. No.: 01
Motion Date: 03/28/11

- against -

XXX

COUNTY OF NASSAU,

Respondent.

The following papers have been read on this application:

	Papers Numbered
<u>Order to Show Cause, Verified Petition, Affirmation, Affidavits and Exhibits</u>	1
<u>Affirmation in Opposition and Exhibits</u>	2
<u>Reply Affirmation and Exhibits</u>	3

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

Petitioner moves, pursuant to General Municipal Law §50-e, for an order granting them leave to file a Notice of Claim. Respondent opposes petitioner's application.

The instant action arises from an automobile accident that occurred on December 10, 2009. Petitioner commenced a subrogation action in the First District Court of the County of Nassau to recover for property damage caused to its subrogor's motor vehicle as a result of the negligence of the respondent herein.

Petitioner argues that, on February 15, 2010, it served a subrogation demand letter upon respondent and that said letter contained all of the information that would be contained in a

Notice of Claim. Petitioner submits that the subrogation demand letter was served within ninety (90) days from the date of accident.

The affidavit of Vicki Cowan, petitioner's Subrogation Senior Claim Service Representative, indicates that respondent was aware of petitioner's claim as the subrogation demand letter containing all of the information contained in a Notice of Claim was served on respondent on February 15, 2010 and received by respondent on February 19, 2010, which is within ninety (90) days from the date of accident.

Petitioner asserts that respondent had knowledge of the loss and knowledge of petitioner's intention to make a subrogation claim within ninety (90) days of the accident and that no prejudice will inure to respondent in granting service of a late Notice of Claim.

In opposition to petitioner's motion, respondent argues that petitioner has failed to establish a reasonable excuse for failure to serve respondent with a Notice of Claim in proper form, that petitioner has failed to prove that respondent acquired actual knowledge of the essential facts constituting the claim within the first ninety (90) days following the alleged accident and that petitioner has failed to prove that respondent did not and will not sustain prejudice by said failures.

Respondent states that "[t]he only papers forwarded to the County were a subrogation letter and expense documents allegedly related to the loss received by the County of February 19, 2010....In its moving papers, petitioner claims that all of the information that would have been included in a notice of claim was provided in their subrogation letter. It is respectfully submitted that if that were true, even that information would be insufficient. Here, in its subrogation letter, petitioner failed to set forth the nature of the claim, the time the accident allegedly occurred, and the manner in which the claim arose, the other vehicle allegedly involved in the accident, the driver of the other vehicle allegedly involved in the accident, and

the license plate number of the other vehicle allegedly involved in the accident pursuant to General Municipal Law 50-e(2). Further, plaintiff failed to serve a supplemental claim within 15 days pursuant to General Municipal Law 50-e(2), which allows plaintiff to file a supplemental claim fifteen days of the request. The County received petitioner's subrogation letter on February 19, 2010. On March 1, 2010, the County rejected petitioner's claim on the ground set forth above and informed petitioner of same....At that point, petitioner had until March 16, 2010 to serve a supplemental notice of claim on the County pursuant to General Municipal Law 50-e(2). Petitioner never served a notice of claim to the County. ...it is now more than one year since petitioner's alleged accident occurred on December 10, 2009, and more than one year since petitioner's claim was rejected, and petitioner failed to proffer a reasonable excuse for its delay."

Respondent further submits that petitioner's subrogation letter cannot be deemed a Notice of Claim and cannot be deemed a letter of intent to sue as it is patently defective. General Municipal Law § 50-e outlines the requirements for proper form and content of the Notice of Claim along with the proper manner of service of the Notice of Claim upon a municipality. Petitioner's subrogation letter did not comply with the set forth requirements. Respondent argues that "in looking at said letter, one would have absolutely no idea as to what petitioner was claiming other than somehow its automobile was damaged."

Respondent adds that "[n]ot only did petitioner's subrogation letter violate General Municipal Law in that the claim was not made in proper form, but said letter was insufficient in that it lacked the specificity surrounding petitioner's accident as required by General Municipal Law 50-e(2). The only description provided was the year and make of the car, the expense documents, the amount petitioner was claiming, the date of the accident, and the city and the parkway that the accident allegedly took place. There was no indication that a County vehicle

was involved. There was no indication of a County vehicle license plate number. There was no indication of the time the accident allegedly took place. There was no indication of how the accident allegedly occurred. Based on that information, it is impracticable for petitioner to believe that an investigation could have taken place....As such, the County was unable to perform a proper investigation into the merits of petitioners (*sic*) claim. It would be unjust to expect respondent to properly defend this claim when more than a year has elapsed.”

Respondent submits that petitioner failed to identify with sufficient particularity the essential facts related to its claim.

Respondent also argues that it will be substantially prejudiced because it did not acquire actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim arose. Respondent states, “[i]nformation that the County would have easily obtained within 90 days of petitioner’s alleged accident most likely is not readily available anymore due to the length of time the County was unaware of petitioner’s claim....The County will be greatly prejudiced by permitting petitioner to file a late notice of claim more than one year after the claim accrued, as it has been denied the opportunity to investigate the facts and defend itself on the merits and/or locate and examine witnesses while the memories of the facts are fresh. In fact, now potential witnesses may be unavailable altogether.”

General Municipal Law §50-e (1)(a) provides that a Notice of Claim must be filed with a municipality within ninety days of the date on which the claim arose. If the Notice of Claim is not filed within that ninety day time period, a claimant must make an application to the Court, within one year and ninety days from the time the cause of action accrued, for permission to file a late Notice of Claim. *See* General Municipal Law §50-I (1) (c); *Allende v. City of New York* , 69 A.D.3d 931, 894 N.Y.S.2d 472 (2d Dept. 2010).

It is noted that the Court’s decision to grant or deny a late Notice of Claim is still purely a discretionary one and the Court remains free to deny an application for an extension in the interests of fairness to the potentially liable public corporation.

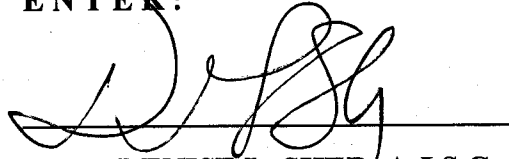
The determination of whether to grant an extension of time in which to serve a late Notice of Claim is left to the Court's discretion. *See Sverdlin v. City of New York*, 229 A.D.2d 544, 645 N.Y.S.2d 843 (2d Dept. 1996). While all relevant factors should be considered, key factors in determining whether leave to serve a late Notice of Claim should be granted are whether claimant has demonstrated reasonable excuse for failing to timely serve a Notice of Claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days after its accrual, or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. *See General Municipal Law § 50-e; Russo v. Monroe-Woodbury Cent. School Dist.*, 282 A.D.2d 465, 723 N.Y.S.2d 198 (2d Dept. 2001). Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and "should be accorded great weight." *See Brownstein v. Incorporated Village of Hempstead*, 52 A.D.3d 507, 859 N.Y.S.2d 682 (2d Dept. 2008).

Under the circumstances detailed above and the legal arguments presented by both parties, the Court finds that petitioner failed to demonstrate a reasonable excuse for failing to timely serve a Notice of Claim. In fact, petitioner fails to offer any excuse at all. The Court further finds that petitioner's subrogation letter fails to comply with the requirements for a Notice of Claim as set for in General Municipal Law § 50-e. Additionally, respondent has demonstrated that said subrogation letter did not provide respondent with actual knowledge of the essential facts constituting the claim and that it would be prejudiced by the delay if petitioner were permitted to file a late Notice of Claim now almost one year after the date of incident. Furthermore, when respondent rejected petitioner's subrogation demand letter, it sent petitioner a letter on March 1, 2010 indicating that it had received a document purporting to be a Notice of Claim, but that it was rejected for noncompliance with the General Municipal Law. Respondent had fifteen days to serve a supplemental Notice of Claim on respondent, but failed to do so and, instead, now brings this application a year later.

Accordingly, based upon the foregoing, the relief sought in the Verified Petition is hereby **DENIED** and the Verified Petition is dismissed.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
June 9, 2011

ENTERED
JUN 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE