Matter of Markl American Ins. Co. v Town of Hempstead
2011 NY Slip Op 31969(U)
July 5, 2011
Sup Ct, Nassau County
Docket Number: 1503/11
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

M1)

TRIAL/IAS PART 32
NASSAU COUNTY

In the Matter of the Application of MARKEL AMERICAN INSURANCE COMPANY a/s/o A&J BOATING INC., for leave to file a late notice of claim, *nunc pro tunc*,

Petitioner,

Index No.: 1503/11
Motion Seq. No: 01
Motion Date: 02/18/11
XXX

- against -

THE TOWN OF HEMPSTEAD,

Respondent.

The following papers have been read on this application:

	Papers Numbered
Order to Show Cause, Petition, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibit	3

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

Petitioner moves, pursuant to General Municipal Law §50-e (5), for an order granting it leave to file a late Notice of Claim and to require respondent to accept said Notice of Claim as if timely filed and served *nunc pro tunc*. Respondent opposes this application.

On June 27, 2010, a boat insured by petitioner sustained substantial damage resulting in the payment by petitioner in the amount of $227,240.74. It is alleged that the subject boat was damaged in a public waterway in Seaford, New York as a result of respondent's failure to properly mark and

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designate an underwater obstruction. Petitioner argues the fact that the hazardous area was improperly marked led petitioner's insured's boat, as well as other vessels, into the area where the hidden hazard was located.

Petitioner asserts that it did not file a timely Notice of Claim with respondent "because during the 90-day period it was still conducting an investigation to determine where, how and why its insured's boat was damaged. It was not until after the 90-day period expired that Markel obtained a report from its marine surveyor identifying the Town of Hempstead's involvement in this loss. Shortly thereafter, Markel notified the Town of Hempstead with its intent to bring a claim."

Petitioner further argues that respondent became aware of petitioner's insured's boat accident, as well as other incidents involving this public waterway, within the 90-day period. Petitioner claims that evidence of respondent's awareness was the fact that, within said 90-day period, respondent changed its marking of this hazardous condition by the placement of four new buoys around this underwater obstruction. Petitioner adds that since respondent had learned of the hazardous condition within the 90-day period, it therefore had adequate time to investigate this condition and, in fact, respondent had ameliorated said condition.

Petitioner alleges that respondent was provided adequate notice to investigate the subject hazardous condition shortly after petitioner's insured's loss and to make changes to markings and buoys on this waterway. Petitioner, therefore claims that respondent cannot legitimately argue that it would be somehow prejudiced in letting petitioner file its Notice of Claim, *nunc pro tunc*. Petitioner states that it acted promptly in investigating the subject claim and it was not until after the 90-day period expired that it first learned of respondent's potential involvement in causing the subject loss. Petitioner states, "[t]his is not the situation in which Markel simply 'sat on its hands'

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as the time period expired. Instead, they promptly employed the services of an independent marine surveyor to investigate the potential cause of this Loss."

In opposition to petitioner's application, respondent argues that "[a]s to a reasonable excuse for the delay in filing a late notice of claim outside the 90-day window, the fact that Petitioner's investigation was delayed though foot-dragging is not a reasonable excuse,..." Respondent submits that Latitude Subrogation Services ("Latitude"), a claims adjuster and duly authorized representative for petitioner, did not start its investigation until a month after the subject incident. Additionally, Truslow Marine Surveys, LLC ("Truslow"), the independent marine surveyor retained by petitioner to inspect the subject boat and determine the extent and amount of damages and to investigate how the subject boat was damaged, did not issue an initial report until approximately one month after the incident despite inspecting the boat two days after the incident. Respondent asserts that the first time it was implicated in the subject incident was in a letter from Truslow to petitioner dated October 4, 2010, but that the first notification respondent received with respect to the subject incident was in a letter from Latitude to respondent dated November 17, 2010, received by respondent on December 3, 2010. This letter was sent "over 1 ½ months after Latitude was notified by Truslow of possible involvement of Town. No excuse is offered for this or other foot-dragging by Petitioner."

With respect to the actual notice issue, respondent argues that no affidavits or other proof in evidentiary form has been offered to establish that respondent had actual knowledge of the incident within the 90-day period under General Municipal Law §50-e. Petitioner's attorney's affirmation states that respondent had actual notice of the subject issue, but respondent asserts that said affirmation is conclusory, not in evidentiary form and based upon double hearsay that was not

corroborated.

Respondent also claims that petitioner has failed to show that respondent would not be substantially prejudiced by the delay in filing a timely Notice of Claim, and that, in fact, respondent would indeed be prejudiced. Respondent states that the instant application was made nearly eight months from the date of incident and, as such, respondent would be hindered in its ability to timely obtain necessary information regarding the facts and circumstances surrounding this claim. Permitting petitioner to file a late Notice of Claim "would hinder the Town's investigation, including Respondent Town's ability to conduct a meaningful municipal hearing shortly after a timely notice of claim being filed when the facts and circumstances of this accident would have been fresh in Petitioner's memory, or to identify, locate and interview witness to the accident, especially non-party witnesses, to ascertain the manner in which the accident happened including the physical condition of the captain or operator of the vessel, the speed of the vessel at the time of the accident, the time of day, etc."

General Municipal Law §50-e (1)(a) provides that a Notice of Claim must be filed with a municipality within ninety (90) days of the date on which the claim arose. If the Notice of Claim is not filed within that ninety (90) 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. *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).

Here, on the issue of actual notice/knowledge of the essential facts, petitioner has failed to produce any proof in evidentiary form that respondent had actual notice of the subject incident. Petitioner's attorney's affirmation states that "Markel has learned that the Town of Hempstead became aware of Markel's insured's boat incident, as well as other incidents, involving this public waterway. Within the 90-day period the Town of Hempstead changed its marking of this hazardous condition by the placement of four new buoys around this underwater obstruction. Accordingly, the Town of Hempstead learned of the hazardous condition within the 90-day period and had adequate time to investigate this condition and in fact they ameliorated this condition." First, this statement is made by an individual who has no first hand knowledge of whether or not respondent had actual notice of the subject indent. Additionally, the argument that respondent had actual notice is based upon the fact that it had changed the marking of the alleged hazardous condition by the placement of four new buoys around the underwater obstruction. This argument is purely conclusory. There is no direct evidence that respondent changed the markers based upon information it received

concerning petitioner's insured's accident. There is no direct evidence that respondent ever had actual notice of the subject incident until the November 17, 2010 letter it received from petitioner.

Petitioner offers as the reasonable excuse for the delay in filing a Notice of Claim that it was still conducting an investigation to determine where, how and why the subject boat was damaged. The Court finds the fact that it took petitioner until November 17, 2010 to notify respondent that it was "responsible for the damages sustained by our insured and paid for by Markel Service Incorporated-Pewaukee" when it was made aware of respondent's alleged culpability in October 4, 2010 and the information regarding respondent' alleged involvement was known on August 31, 2010, does not constitute a reasonable excuse for the delay in filing a Notice of Claim.

Furthermore, petitioner has failed to demonstrate how respondent would not be prejudiced with the filing of a late Notice of Claim.

Accordingly, based upon the above determinations, petitioner's application is **DENIED** and the petition is hereby 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
July 5, 2011

ENTERED
JUL 08 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE