

Allstate Ins. Co. v County of Nassau

2011 NY Slip Op 31992(U)

June 17, 2011

Supreme Court, Nassau County

Docket Number: 9468/10

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 4
NASSAU COUNTY
RETURN DATE: 3/29/11
MOTION SEQ. NO.:001
INDEX NO.: 9468/10

ALLSTATE INSURANCE COMPANY
A/S/O ELLEN MAZELLA,

Petitioner,

-against-

THE COUNTY OF NASSAU,
Respondent.

- The following papers read on this petition (numbered 1-2):**
- Order to Show Cause.....1**
 - Affirmation in Opposition.....2**

Petitioner ALLSTATE INSURANCE COMPANY A/S/O ELLEN MAZELLA (“Petitioner”) moves for an Order pursuant to **General Municipal Law §50-e** (“**Section 50-e**”) permitting Petitioner to file a late notice of claim upon respondent, THE COUNTY OF NASSAU (“Respondent” or the “COUNTY”).

This action arises out of a motor vehicle accident that occurred on August 19, 2009, between a vehicle owned and operated by Petitioner’s insured, Ellen Mazella (the “Allstate Insured Vehicle”), and a vehicle operated by an on-duty police officer, James E. Muller and owned by the Nassau County Police Department (the “Police Vehicle”). According to the Police Accident Report filed by officer Frederick Hannsgen, the Allstate Insured Vehicle was hit in the rear by the Police Vehicle, after an abrupt stop by the Allstate Vehicle. Petitioner states that the Allstate Insured Vehicle sustained property damage, for which Petitioner paid the sum of \$6,207.83 (less the deductible). Petitioner claims a right of subrogation, pursuant to the applicable policy of insurance (which Petitioner does not attach), to proceed against the Respondent to recover such sum.

On or about September 14, 2009, Petitioner sent a letter (the “September Notice”), with the subject heading “Subrogation Claim Notice,” to the Nassau Police Department Precinct 4, 99 Nichols Ct., Hempstead, NY 11550-3166. On or about November 4, 2009, Petitioner sent the identical letter (except for a discrepancy in the amount of loss) (the “November Notice”) to the same address. The November Notice was stamped as received by the Office of the Nassau County Attorney on November 23, 2009. On or

[* 2]
about May 14, 2010, Petitioner submitted the Order to Show Cause which brought on the instant proceeding.

Petitioner seeks leave to file a Late Notice of Claim, based upon its contention that Respondent had actual notice of the claim by virtue of the September Notice, and that "Said claim was never rejected by the County of Nassau." [Affirmation in Support, p.2]. Petitioner claims that Respondent had knowledge of the subject motor vehicle accident on the date that it occurred, because the offending vehicle was a police car owned by the COUNTY, and the driver of the vehicle was a police officer employed by the Nassau County Police Department. [Affirmation in Support, p.4].

Respondent opposes on the grounds that Petitioner has not shown a reasonable excuse for its failure to timely file a Notice of Claim, and that Respondent is prejudiced by the delay insofar as it has been deprived of an opportunity to conduct a prompt investigation of the loss.

Section 50-e provides that, as a condition precedent to the commencement of a tort action against a public corporation, a claimant must file a Notice of Claim within ninety days after the claim arises. **Section 50-e (1)(a)**. The Notice of Claim must be in writing, sworn to by or on behalf of the claimant, and must contain the information set forth in **Section 50-e (2)**. Service of the Notice of Claim upon the COUNTY must be effected by personal delivery or by registered or certified mail, to the County Clerk or the County Attorney. *See Section 50-e (3)(a); CPLR §311(a)(4)*. If service is performed in a timely, but improper manner, it is nonetheless valid if it is actually received by the proper person within the ninety-day period and not rejected within thirty days of receipt. *See Section 50-e (3)(c)*.

The September Notice is defective in that, among other things, it is unsworn, and it was not served upon the proper person or in the proper manner. Nor is there any evidence that it was actually received by the appropriate person, and that such person failed to reject it within thirty days. *See Section 50-e (3)(a), (c)*.

The November Notice is similarly defective, except that the November Notice was actually received by the Nassau County Attorney. It was received, however, after the expiration of the statutory ninety-day period. *See Section 50-e (3)(c)*. Further, the County Attorney's office rejected the November Notice on the date it was received, and Petitioner did not file a new notice complying with the statute within ten days after receipt of the rejected notice. *See Section 50-e (3)(d)*.

Accordingly, the Court finds that neither the September Notice nor the November Notice satisfied the Notice of Claim requirement. Petitioner's reliance on the contention that the September Notice was not rejected by Respondent is unavailing insofar as there is no evidence that it was ever received.

The Court has broad discretion, however, to permit a late Notice of Claim in appropriate circumstances. **Lemma v. Off Track Betting Corporation**, 272 A.D.2d 669. In exercising such discretion, the Court must consider the factors set forth in **Section 50-e(5)**, particularly: (i) whether the Petitioner offers a reasonable excuse for its delay, (ii) whether Respondent acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, and (iii) whether granting the Petitioner's application would substantially prejudice the Respondent. **Section 50-e(5)**; **Matter of Smith v. Baldwin UFSD**, 63 AD3d 1078; **Matter of Burgess v. County of Suffolk**, 56 AD3d 769; **Matter of Kittredge v. New York City Housing Authority**, 275 AD2d 746; **Lemma**, 272 A.D.2d at 669. Neither the presence nor absence of any one factor is dispositive. **Matter of Burgess**, 56 AD3d at 770. The Courts accord great weight, however, to the consideration of actual knowledge. **Id.**; **Lemma**, 272 A.D.2d at 671.

In this case, Petitioner offers no excuse for failing to properly file a Notice of Claim within the statutory period. At best, the September Notice and November Notice represent failed attempts to file a Notice of Claim, which give rise to an implication of "law office failure." It is well settled, however, that law office failure does not constitute a reasonable excuse for purposes of **Section 50-e(5)**. See **Matter of Guminiak v. City of Mount Vernon Industrial Development Agency**, 68 AD3d 1111; **Matter of Smith**, 63 AD3d at 1079; **Matter of Kittredge**, 275 AD2d at 746.

Failure to offer a reasonable excuse is not fatal where the respondent has received contemporaneous knowledge of the facts alleged in the claim, and where there is no demonstrable prejudice to the respondent. **Lemma**, 272 A.D.2d at 671. Contrary to Petitioner's contentions, however, there is no evidence that Respondent acquired actual knowledge of the essential facts constituting the claim within the ninety day statutory period or a reasonable time thereafter.

Neither the presence of Nassau County Police Department employees at the scene of the accident, nor the filing of a police accident report, is sufficient to impute timely knowledge of the claim to the COUNTY. See **Matter of Guminiak**, 68 AD3d at 1112; **Matter of Hill v. New York City Transit Authority**, 68 AD3d 866, 867; **Matter of Smith**, 63 AD3d at 1079; **Matter of Dancy v. Poughkeepsie Housing Authority**, 220 AD2d 413, 414. There is no evidence that the September Notice was ever received by the

[* 4]
COUNTY. The November Notice was received within a reasonable time (six days) after the expiration of the ninety-day period, but it does not provide sufficient information to constitute notice of the essential facts constituting the claim. There is no indication of the nature of the claim (property damage), nor the manner in which the claim arose. Although the November Notice states that "we are now forwarding you final copies of the expense documents related to the loss," there is no evidence regarding which, if any, expense documents were forwarded to Respondent or what information they contained. Thus, the Court cannot determine whether such documents, if any, provided the missing information regarding the nature of the claim.

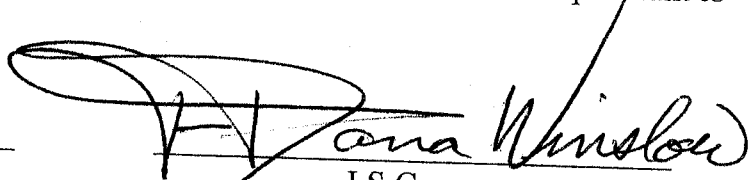
The Court notes that there was a delay of almost six months after Respondent's rejection of the November Notice [November 23, 2009], before Petitioner filed the instant application [May 14, 2010]. (The later submission date of March 29, 2011 reflects the fact that this matter was erroneously transferred to the District Court pursuant to CPLR §325(d) and subsequently returned to the Supreme Court pursuant to the Order of the Court dated February 1, 2011.)

The Court notes further that the Proposed Notice of Claim (the "Proposed Notice") attached to Petitioner's papers [Exhibit C] is marred by errors. In paragraph 3, the Proposed Notice incorrectly states that the Claimant's vehicle "was struck in the rear by a certain 1990 Chevrolet truck owned by the respondents and *operated by Ellen Mazzella*, their agent, servant and/or employee [emphasis supplied]." Ellen Mazzella is the Petitioner's insured. Respondent's vehicle was operated by police officer James E. Muller. Further in paragraph 3, the Proposed Notice incorrectly states that Respondent's vehicle was a *2006 Sanitation Truck*, whereas the police accident report indicates that it was a 1990 Chevrolet truck. Finally, the attached Individual Verification incorrectly states that "before me personally came *Sherry Bock* [emphasis supplied], to me known by me duly sworn," whereas the notarized signature was that of Vicky Cowan.

Based upon the foregoing, particularly the lack of any reasonable excuse for the initial delay in filing a proper Notice of Claim, the lengthy delay following the rejection of the November Notice, and the deficiency of proof that Respondent had acquired timely knowledge of the essential facts, the Court declines to exercise its discretion on behalf of Petitioner. Accordingly, it is

ORDERED, that the application for leave to file a late Notice of Claim pursuant to Section 50-e is denied.

Dated: June 17, 2011


J.S.C.

ENTERED
JUL 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE