

Matter of Schwartz v Nassau Health Care Corp.

2011 NY Slip Op 32091(U)

July 13, 2011

Supreme Court, Nassau County

Docket Number: 6404/11

Judge: Jeffrey S. Brown

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 21
In the Matter of the Petition of
AIMEE SCHWARTZ,

Petitioner,

for an Order granting leave to amend the Notice
of Claim or in the alternative, file a late Notice of
Claim *nunc pro tunc*,

Index No. 6404/11
Mot. Seq. # 1
Motion Date 5.19.11
Submit Date 6.9.11

-against-

THE NASSAU HEALTH CARE CORPORATION,

Respondent.

-----X
=====

The following papers were read on this motion:	Papers Numbered
Order to Show Cause, Affidavits (Affirmations), Exhibits Annexed	1
Answering Affidavit	2
Reply Affidavit	3

=====

Plaintiff moves by order to show cause for the following relief: an order pursuant to the General Municipality Law (GML) § 50-e (5) and (6), granting petitioner leave to amend a notice of claim upon respondent, the Nassau Health Care Corporation ("NHCC"); or in the alternative, an order granting petitioner leave to serve a late notice of claim and have same deemed timely served, *nunc pro tunc*. Respondent argues that both requests for relief should be denied since petitioner drafted and submitted a defective notification.

This negligence action arises out of petitioner Aimee Schwartz's alleged slip and fall accident, which purportedly occurred on the eighth floor of the Nassau University Medical Center ("NUMC") located at 2201 Hempstead Turnpike, East Meadow, New York 11554. In support of this application, petitioner submits her own affidavit.

Petitioner states that while visiting her mother at the NUMC on December 11, 2010, at 2:00 PM, she fell approximately five feet outside of Room 810 as a result of slipping on a foreign substance located on the floor of the hospital's eighth floor. Consequently, petitioner claims to have sustained a fractured right knee cap and injuries to her neck and back.

On March 8, 2011, petitioner rendered the original notice of claim against NHCC. Respondent received the original notice of claim within the required ninety-day period as codified in GML § 50-e. Under the section requiring petitioner to depict the time when, the place where and the manner in which the claim arose, petitioner wrote the following: "December 11, 2010 at 2:00 p.m. slipped and fell while walking into a hospital room on the 8th floor at the Nassau University Medical Center." On March 16, 2011, respondent's counsel rejected the original notice of claim because it was allegedly "inadequate and wholly fail[ed] to properly specify the place and manner in which the subject claim arose." Furthermore, respondent argues that the deficiency of the original notice of claim has allowed it to be prejudiced by the inability to conduct a meaningful investigation of the transient condition.

As a result, petitioner drafted, and now requests this Court to accept, an amended notice of claim, which includes a detailed description of when, where and how the claim arose. For instance, petitioner amended the claim's particulars to include the following: "The accident took place at or about 2:00 p.m. on December 11, 2010, in the hallway on the 8th Floor, approximately 5 feet from Room 810 and located to the front left side of the nurse's station

which, upon information and belief, was approximately 50–75 feet from the subject location,” and that the accident occurred as a result of slipping on a foreign substance found on the floor of the subject location.

To preserve petitioner’s rights, a summons and verified complaint was filed simultaneously with the instant application.

It is well established that a timely notice of claim is a prerequisite for bringing a tort action against a municipality. GML § 50-e; *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 358, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981). The GML requires that the notice of claim include the time, place and manner in which the claim arose. GML § 50-e(2); *see also Calia v. Bd. of Ed.*, 154 A.D.2d 640, 546 N.Y.S.2d 646 (2d Dep’t 1989); *Flanagan v. County of Westchester*, 238 A.D.2d 468, 657 N.Y.S.2d 59 (2d Dep’t 1997). The statutory requirement “regarding the recital of the place of occurrence is met where the notice describes the accident location with sufficient particularity to enable defendant to locate the alleged defect and to conduct a proper investigation of the site and otherwise assess the merits of plaintiff’s claim.” *Caselli v. New York*, 105 A.D.2d 251, 253, 483 N.Y.S.2d 401 (2d Dep’t 1984). This allows the municipality “to conduct an investigation while the acts surrounding the incident are still fresh in the minds of any witnesses.” *Calia*, 154 A.D.2d at 640. Additionally, GML § 50-e(6) allows a court to grant a request for leave to amend a notice of claim if the mistake, omission irregularity or defect in the original notice was made in good faith and if it appears that the other party was not prejudiced thereby.

There is nothing in the record that indicates that the original notice of claim was prepared and served in bad faith. Thus, this court must ascertain whether the defendant was prejudiced by the defect in the notice. *See Zapata v. City of New York*, 225 A.D.2d 543, 543, 638 N.Y.S.2d 487

(2d Dep't 1996). In doing so, this court must consider "circumstances which directly impact the [respondent's] ability to defend the potential claim on the merits." *Isereau v. Brushton-Moira Sch. Dist.*, 6 A.D.3d 1004, 1005; 776 N.Y.S.2d 129 (3d Dep't 2004).

In the instant matter, there is no circumstance that directly impacts respondent's ability to defend its claim. Although the original notice of claim does not specify the precise location where the accident occurred and the foreign substance that caused the slip, these omissions are not sufficient to establish a prejudice for the purposes of denying a request to amend the notice of claim pursuant to GML § 50-e(6). Petitioner executed and served a timely notice of claim advising respondent as to the petitioner's accident on the eighth floor at the NUMC, and acted quickly — approximately six weeks since the expiration of the statutory ninety-day period — to correct the lack of specificity as to where exactly on the eighth floor the accident occurred.

Since respondent relies heavily on *Flanagan v. County of Westchester* and *Lopez v. City of New York*, a discussion on these two cases is warranted. In *Flanagan*, 238 A.D.2d 468,469, 657 N.Y.S.2d 59, plaintiffs moved to amend their original notice of claim to include the exact location where plaintiff fell and sustained his injury. The Second Department affirmed the Supreme Court's denial of plaintiffs' motion on the grounds that the motion to amend was requested three years after the incident occurred and the location where plaintiff fell had already been renovated. *Id.* Here, there was no significant time delay between the execution and delivery of the original and amended notices of claim. And, as far as the record indicates, the NUMC's eighth floor has not been renovated since the time of the accident. Therefore, respondent has not been prejudiced, and was able to conduct a meaningful investigation.

In *Lopez*, 287 A.D.2d 694, 732 N.Y.S.2d 81, plaintiff executed and delivered a notice of claim that failed to specify the correct location where the accident took place. Defendant did not

learn of the correct location until more than five years after the accident, when the plaintiff testified at her deposition. *Id.* at 695. Plaintiff moved to amend its original notice of claim to include the correct location three years and five months after the plaintiff's deposition. *Id.* The Second Department affirmed the Supreme Court's denial of plaintiff's motion to amend the original notice of claim, and held that the significant amount of time prejudiced the defendant since it was deprived of the opportunity to conduct a meaningful investigation while the facts surrounding this incident were still fresh. *Id.*

Furthermore, respondent argues that the petitioner's inadequate notice leads to the respondent being potentially prejudiced by the inability to conduct a meaningful investigation of the transient condition. However, the highly transient nature of the alleged defect, foreign substance on the hospital's eighth floor, would have made it impossible for the defect to be investigated even if a notice of claim, containing a detailed description of where and how the accident occurred, was executed and delivered within the statutory ninety-day period codified under GML § 50-e. *See, e.g., Reyes v. New York City Hous. Auth.*, 221 A.D.2d 240, 634 N.Y.S.2d 2 (1st Dep't 1995); *Baez v. New York City Hous. Auth.*, 182 A.D.2d 554, 583 N.Y.S.2d 1 (1st Dep't 1992) ("Given the nature of the defect — garbage which was awaiting collection on the date of the accident — and the statutory provision requiring only that notice be given within 90 days after the claim arises, even a highly specific notice would not be expected to afford defendant the opportunity to inspect the defective condition (which was presumably removed shortly after plaintiff fell over it).").

Accordingly, it is

ORDERED, that petitioner's application for an order pursuant to General Municipal Law 50-e granting leave to amend a notice of claim is hereby GRANTED; and it is further

ORDERED, that the amended notice of claim appended to petitioner's affirmation is deemed properly served, nunc pro tunc.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
July 13, 2011

ENTER :


HON. JEFFREY S. BROWN
J.S.C.

Attorneys for Petitioner
Friedman Harfenish Kraut & Perlstein, Esqs.
3000 Marcus Avenue, Ste. 2E1
Lake Success, NY 11042-1005
516-355-9600

Attorneys for Respondent
Montfort Healy McGuire & Salley, LLP
840 Franklin Avenue
PO Box 7677
Garden City, NY 11530
516-747-4082

ENTERED
JUL 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE