

Tolliver v New York City Hous. Auth.

2011 NY Slip Op 32888(U)

October 28, 2011

Sup Ct, NY County

Docket Number: 110005/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
CYNTHIA S. KERN

PRESENT: _____
J.S.C.
Justice

PART 52

TOLLIVER, RAMONA
- v -
N.Y.C.H.A.

INDEX NO. 110005/11
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed decision.

FILED

NOV 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/28/11 _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
RAMONA TOLLIVER,

Petitioner,

Index No. 110005/11

-against-

DECISION/ORDER

THE NEW YORK CITY HOUSING AUTHORITY,

FILED

Respondent.

NOV 01 2011

-----X
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner brought the instant petition to serve a late Notice of Claim for her action to recover damages for personal injuries she allegedly sustained when she fell in a park located in the Housing project known as the Jefferson Houses, in the County, City and State of New York on June 3, 2010. For the reasons set forth below, her petition is granted.

The relevant facts are as follows. On June 3, 2010, petitioner alleges she sustained injuries when she was walking through a park located in the New York City Housing Authority ("NYCHA") project known as the Jefferson Houses, located at East 113th Street between First and Second Avenues, New York, New York. Petitioner alleges that as she was exiting said park, her foot became entangled in a knocked down, broken wooden fence which caused her to fall.

Petitioner served a Notice of Claim upon NYCHA on February 18, 2011, over five months after the ninety day period to do so expired. Petitioner now moves for an order deeming the Notice of Claim served on February 18, 2011 timely served nunc pro tunc.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law (“GML”) §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for her delay, whether the delay prejudiced the municipality’s defense and whether the municipality acquired “actual knowledge of the essential facts constituting the claim” within 90 days after the claim arose or within a reasonable time thereafter. *See* GML §50-e(5); *Strauss v. New York City Transit Authority*, 195 A.D.2d 322 (1st Dept 1993). It is plaintiff’s burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v. City of New York*, 39 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the ninety day statutory period or shortly thereafter. *See Justiniano v. New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993).

Considering all the above factors together, petitioner’s motion to serve a late Notice of Claim is granted. Petitioner’s excuse for untimely filing the Notice of Claim was that she was physically incapacitated and focused on healing so she did not have time to file said Notice of Claim. However, in order to establish physical incapacity as a sufficient excuse for failing to timely file a Notice of Claim, the claim of incapacitation must be substantiated by medical evidence. *See Tavarez v. City of New York*, 26 A.D.3d 297 (1st Dept 2006). As petitioner has not

put forth any medical records suggesting she was incapacitated following her accident, her excuse is unreasonable. However, the lack of a reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. *See Ansong v. City of New York*, 308 A.D.2d 333 (1st Dept 2003); *see also Porcaro v. City of New York*, 20 A.D.3d 357 (1st Dept 2005).

NYCHA has, however, acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter. On June 4, 2010, the day after petitioner's accident, petitioner informed Terrelle Sweat, a NYCHA maintenance worker for her building, that she fell on the wooden fence on the outskirts of the park. Also on that day, petitioner alleges that she informed Nadia Valdez, another NYCHA maintenance worker, about her accident. A few days later, petitioner again spoke to Ms. Sweat to inform her about the specifics of her injuries and diagnoses. The fact that petitioner reported her accident to two employees of NYCHA is enough to satisfy the requirement that NYCHA acquire actual knowledge of the facts forming the basis of petitioner's claim. *See Fredrickson v. New York City Housing Authority*, 87 A.D.3d 425 (1st Dept 2011) (holding that NYCHA acquired actual knowledge when petitioner reported her accident to employees in NYCHA's management office within three days of her accident). However, even if the notice provided to NYCHA's employees did not constitute actual notice, which it did, petitioner's Notice of Claim itself can constitute actual notice as it was served within a reasonable amount of time after the ninety day period expired. *See Harrison v. City of New York*, 188 A.D.2d 367 (1st Dept 1992) (bolstering claim that NYCHA received actual notice of the essential facts of claim by noting that respondent received Notice of Claim only one month after expiration of 90-day period); *see also Gelish v. Dix Hills Water District*, 58 A.D.3d 841 (2d Dept 2009) (holding that petitioner's Notice of Claim could constitute actual

