Matter of Garcia v New York City Hous. Auth.
2011 NY Slip Op 32932(U)
November 1, 2011
Sup Ct, NY County
Docket Number: 100370/11
Judge: Barbara Jaffe
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SCANNED ON 11/7/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe, Justice

PART 5

Antonia Garcia,

INDEX NO. 107826/11

MOTION DATE 8/9/11

- v -

MOTION SEQ. NO. 001

New York City Housing Authority,

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

NOV 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/1/11

NOV 0 1 2011

BARBARA JAFFE J.S.C., J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5 **BARBARA JAFFE J.S.C.**

---x

In the Matter of the Claim of:
ANTONIA GARCIA,

Petitioner,

For Leave to Serve a Late Notice of Claim, Nunc Pro Tunc,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

---x

Index No. 100370/11

Argued: 8/9/11

DECISION & ORDER

FILED
NOV 04 2011
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By order to show cause dated July 7, 2011, petitioner moves pursuant to General Municipal Law (GML) § 50-e for an order granting leave to serve the New York City Housing Authority (NYCHA or respondent), *nunc pro tunc*, with a late notice of claim. Respondent opposes.

I. BACKGROUND

On January 27, 2011, at approximately 8:20 a.m., petitioner slipped and fell on a slippery portion of the sidewalk adjacent to 140 West 104th Street in Manhattan. (Affirmation of Andrew J. Levine, Esq., dated June 29, 2009 [Levine Aff.], Exh. A).

On February 4, 2011, petitioner retained current counsel (*id.*), and on February 16, 2011,

she electronically filed a notice of claim on the New York City Comptroller's website, identifying NYCHA and the New York City Department of Housing Preservation and Development as the City agencies involved in the matter (*id.*, Exh. B). She never served NYCHA with the notice of claim at its physical address. (*Id.*).

By letter dated March 11, 2011, petitioner indicated to NYCHA that on January 27, 2011, she slipped and fell on the sidewalk in front of 140 West 104th Street "due to improperly cleared snow and ice on and next to the sidewalk," and, pursuant to the Freedom of Information Law, requested its yearly ground survey for the subject sidewalk, the snow removal log book entries for the 30 days before and including the date of the accident, and all complaints regarding "improperly cleared or removed snow from the sidewalk" received before the date of the accident. (*Id.*, Exh. C).

On July 11, 2011, petitioner served NYCHA with the instant order to show cause, annexing thereto, *inter alia*, her proposed notice of claim in which she sets forth the manner in which her claim arose:

> [T]he claim arose on January 27, 2011, at approximately 8:20 a.m., on the sidewalk located at/near/in front of 140 W. 104th Street, New York, New York. Specifically, [petitioner] was caused to slip and fall due to a dangerous, hazardous, encumbered, icy, slippery, wet, and trap-like condition existing on the sidewalk thereat.

(*Id.*, Exh. A). The notice of claim also provides, in pertinent part, that NYCHA was negligent as follows:

> THE NEW YORK CITY HOUSING AUTHORITY, their agents, servants, contractees and/or employees were negligent, careless, and reckless in the ownership, operation, maintenance, supervision, inspection, [and] control of the aforesaid sidewalk in that said sidewalk was caused, permitted, and allowed to be, become and remain encumbered, icy, slippery, wet, ... defective, dangerous, hazardous and trap-like with [ ] slippery substances and litter remaining on said sidewalk for a long and/or unreasonable length of

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time.

(*Id.*).

II. CONTENTIONS

Petitioner explains her failure to file a notice of claim with NYCHA as resulting from a clerical error which, she alleges, is excused by her prompt correction of it. (*Id.*). She also asserts that NYCHA learned of the essential facts underlying her claim when it received her March 11th letter. (*Id.*).

In opposition, NYCHA denies that a clerical error constitutes a reasonable excuse for failing to file a notice of claim timely, and that in any event, petitioner has failed to explain her delay in moving for leave to serve a late notice of claim, and it denies that it learned of the facts underlying her claim from her letter, as petitioner neither mentions litter nor negligence in the letter, and asserts that it will be prejudiced in its ability to investigate her claim as a result. (Respondent's Mem. of Law).

III. ANALYSIS

Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality or agency acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel.*

Torres v New York City Health & Hosps. Corp., 81 AD3d 448, 448 [1st Dept 2011]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account all other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

A. Reasonable excuse

As law office failure, including clerical errors and "mere inadvertence," does not constitute a reasonable excuse for failing to file a notice of claim timely (*Lyerly v City of New York*, 283 AD2d 647 [2d Dept 2001]; *Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [1st Dept 2000]), petitioner has failed to offer a reasonable excuse for her delay.

And, although an error in determining the identity of the municipal entity to be served may be excused if remedied promptly upon discovery of the error (GML § 50-e[5]; *Ruffino v City of New York,* 57 AD3d 550 [2d Dept 2008]; *Gherardi v City of New York*, 294 AD2d 101 [1st Dept 2002]), petitioner made no such error here, having initially identified NYCHA as a City agency to be served. (*Cf. Ruffino*, 57 AD3d 550 [where petitioner initially served New York City Transit Authority, believing it owned boardwalk on which she fell, and later discovered that City owned it, delay in serving City with notice of claim excusable]).

B. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st

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Dept 1999]). A municipal agency has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the agency. (*Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 [2d Dept 2010]). The agency must have notice or knowledge of the specific claim and not merely general knowledge that a wrong has been committed. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

Here, petitioner asserts that NYCHA was negligent in permitting "slippery substances and litter" to remain on the sidewalk on which she slipped and fell. Although she alleges in her March 2011 letter that she slipped and fell on the subject sidewalk and requests documents pertaining to NYCHA's snow and ice removal, she neither mentions litter nor requests any documents pertaining to NYCHA's litter removal activities. Consequently, the letter does not afford NYCHA with actual knowledge of petitioner's specific negligence claim.

Moreover, as a notice of claim must be served "on the public corporation against which the claim is made" (GML § 50-e[3][a]), and as City and NYCHA are separate legal entities, service of a notice of claim on City does not constitute service on NYCHA (*Quinn*, 273 AD2d 144), and notice to City is not imputed to respondent. (*Lyerly*, 283 AD2d 647 [notice of claim served on City not imputed to NYCHA]; *Seif v City of New York*, 218 AD2d 595 [1st Dept 1995]

[same]).

C. Prejudice

A claimant also bears the burden of establishing lack of prejudice. (*Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams*, 6 NY3d at 539). Absent such notice, a delay in serving a notice of claim will "prejudice[ ] respondent's ability to investigate, . . . identify witnesses, and collect their testimony based on fresh memories." (*Arias v New York City Hous. Auth.*, 40 AD3d 298, 299 [1st Dept 2007]). And although the transitory nature of an alleged defect may demonstrate a lack of prejudice where "it is highly unlikely that the conditions existing at the time of the accident would have existed until the end of the 90-day period in which a claim would have been timely filed," (*Ferrer v City of New York*, 172 AD2d 240, 240 [1st Dept 1991]; *see Myette v New York City Hous. Auth.*, 204 AD2d 54 [1st Dept 1994]), this factor weighs against granting an application to file a late notice of claim where neither a reasonable excuse nor actual knowledge has been shown (*Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

Here, as the snow, ice, and litter that caused petitioner's injury were transitory in nature, they did not likely exist at the end of the 90-day period during which she was required to file a notice of claim. However, as petitioner has demonstrated neither a reasonable excuse for her delay nor NYCHA's actual knowledge of the essential facts underlying her claim, and as she bases her argument in this regard on NYCHA's knowledge, she has also failed to demonstrate lack of prejudice. (*See Matter of Polanco v New York City Hous. Auth.*, 39 AD3d 320 [1st Dept

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2007] [petitioner who allegedly tripped and fell on snow and ice failed to demonstrate lack of prejudice despite transitory nature of alleged defect, as she established neither actual knowledge nor reasonable excuse]; *Lyerly*, 283 AD2d 647 [where petitioner argued that NYCHA would not be prejudiced by late filing of notice of claim as it obtained actual knowledge and failed to demonstrate actual knowledge, she also failed to establish lack of prejudice]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that petitioner's application for leave to serve a late notice of claim is denied.

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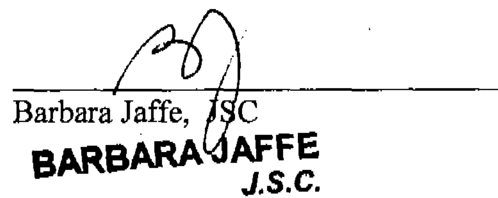

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 1, 2011
New York, New York

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FILED
NOV 04 2011
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