

**Matter of Dubinsky v City of New York**

2011 NY Slip Op 33469(U)

December 13, 2011

Sup Ct, NY County

Docket Number: 108600/11

Judge: Alexander W. Hunter Jr

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

Index Number : 108600/2011

DUBINSKY, MELVIN

vs

CITY OF NEW YORK

Sequence Number : 001

LEAVE SERVE LATE NOT. OF CLAIM

PART 33

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits

**FILED**

No(s) 1-4

Answering Affidavits — Exhibits \_\_\_\_\_

No(s) 5-18

Replying Affidavits \_\_\_\_\_

DEC 20 2011

No(s) 19-24


Upon the foregoing papers, it is ordered that this motion is

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*See memorandum decision and judgment  
annexed hereto.*

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

Dated: 12/13/11

 \_\_\_\_\_, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

-----X  
In the Matter of the Application of  
Melvin Dubinsky,

Index No.: 108600/11

Petitioner,

Decision and Judgment

For Permission to Serve A Notice of Claim  
Nunc Pro Tunc on,

-against-

**FILED**

The City of New York,

**DEC 20 2011**

Respondent.

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COUNTY CLERK'S OFFICE

-----X  
**HON. ALEXANDER W. HUNTER, JR..**

The application by petitioner for permission to serve a late Notice of Claim against respondent is denied and the petition is dismissed.

Petitioner is an attorney who has participated in the Assigned Counsel Plan ("ACP"), pursuant to Article 18-B of the New York County Law. In accordance with the ACP, attorneys must submit vouchers for services rendered in order to be paid. The judge who presided over the matter in which the attorney is seeking payment is responsible for reviewing and approving the voucher for payment.

After receiving information regarding perceived overbilling on the part of petitioner, the Office of the Criminal Justice Coordinator ("CJC") conducted an audit of petitioner's billing records in June 2010. A letter dated July 1, 2010 was sent to petitioner informing him that the CJC was performing an audit of his billing records. On July 27, 2010 and August 4, 2010, both parties met to review his billing records and petitioner was informed that respondent believed that he was overbilling. It was ultimately determined that the records indicated that petitioner was billing for an excessive number of hours. On August, 5, 2010, Megan Bacigalupi, an attorney with the CJC sent an email to Mr. Gershuny, the Supervising Court Attorney at the Criminal Court, which stated that petitioner had been "unable to justify his over-billing on many of his cases" and the CJC wanted to "refer these cases back to the original judges for further review".

On May 2, 2011, petitioner contends that he received a Verified Answer from respondent John Liu in a separate action. Annexed to the Verified Answer was an affidavit from Ms. Bacigalupi which contained a redacted portion of the allegedly defamatory email. Petitioner argues that as a result of the email, five judges made ex post facto reductions in the amounts they had previously approved for his vouchers. Petitioner further argues that the recipients of Ms.

Bacigalupi's email are apt to forward and spread the email to other members of the judiciary in New York County Criminal Court.

Petitioner intends to commence an action against respondent to recover damages for defamation and now seeks permission from this court to file a late Notice of Claim against respondent. He asserts that he did not discover the existence of the defamatory email until May 2011. He argues that respondent would not be prejudiced by the late Notice of Claim since the relevant records are created and maintained by respondent. Petitioner further asserts that the audits performed by the CJC was contrary to law and therefore, respondent cannot maintain a defense of immunity against a claim of defamation.

In response, respondent argues that petitioner has failed to meet the requirements outlined in General Municipal Law § 50-e(5). Firstly, respondent argues that petitioner acquired knowledge of the email on or about July 27, 2010, when he was informed by Deputy CJC Shari Hyman that respondent believed he was overbilling and of her intent to inform the Criminal Court. Respondent contends that petitioner was on notice in July or August 2010 to make his claim and failed to do so. He therefore has no excuse for his delay in commencing an action a year after the fact. Secondly, respondent argues that petitioner has failed to prove that respondent acquired actual knowledge of the claim within 90 days after the claim arose or a reasonable time thereafter. Possession of the billing records and an investigation into petitioner's overbilling does not equate to an investigation into a defamation claim. Thirdly, respondent argues that the lack of timely notice did not allow the city to conduct a proper investigation of the claim at the time it arose and therefore respondent will be substantially prejudiced by a late Notice of Claim. Finally, respondent asserts that the late Notice of Claim should be denied because petitioner's claim lacks merit. Statements made in the course of an employee's official duties are privileged and as such, respondent is immune from petitioner's defamation action. Respondent further argues that the malice required to overcome the CJC employee's qualified privilege is not present in the case at bar.

In reply, petitioner argues that he has a reasonable excuse for his delay because he first learned of the defamatory email long after the statutory period had expired. Petitioner maintains that he did not see the full contents of the email until July 19, 2011 and filed the instant petition on July 26, 2011. Petitioner claims that respondent did have actual notice knowledge of the facts constituting the claim because the CJC performed the audit of petitioner's billing records and a CJC employee sent the defamatory email. Petitioner maintains that respondent had to be aware of the risk of a defamation claim when sending the email to the Criminal Court. In addition, petitioner argues that the audit was illegal and in contravention of County Law Article 18-B §§ 722-b and c. Petitioner maintains that respondent acquired notice of the claim when it conducted an audit of the vouchers that had already been approved and paid. Petitioner reiterates his previous argument that respondent will not be substantially prejudiced because respondent created and maintained the records in question. Petitioner also argues that the CJC's audit and the email are not privileged because neither of those instances were done in the course of the employee's official duties. In addition, petitioner argues that evidence of malice on Ms.

Bacigalupi's part does exist because she acted with reckless disregard as to the truth of the statements in her email. Finally, petitioner argues that his claim is meritorious because he has shown evidence that respondent is not entitled to a qualified or absolute privilege.

Filing a Notice of Claim pursuant to G.M.L. § 50-e is a condition precedent for tort claims against municipalities. **G.M.L. § 50-e(1)(a)**. In order to serve a Notice of Claim beyond the 90 day statutory period, petitioner must satisfy three elements. G.M.L. § 50-e(5) provides that petitioner must prove that 1) there was a reasonable excuse for the delay; 2) the municipality had "actual knowledge of the essential facts constituting the claim" within 90 days after the claim accrued or a reasonable time thereafter; and 3) the delay in serving the late Notice of Claim will not prejudice the municipality. The purpose of the Notice of Claim is "to protect the public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently." **Heiman v. City of New York, 85 A.D.2d 25, 27 (1<sup>st</sup> Dept. 1982)**.

Petitioner was required to serve a Notice of Claim arising from the August 5, 2010 email by November 3, 2010. Defamation claims accrue on the date the defamatory statement is published to another person and not when he first learns of the defamatory statement. **Firth v. State, 98 N.Y.2d 365 (2002)**; see also, **Teneriello v. Travelers Companies, 226 A.D.2d 1137 (4<sup>th</sup> Dept. 1996)**; **Seymour v. New York State Elec. & Gas Corp., 215 A.D. 971 (3<sup>rd</sup> Dept. 1995)**. Although the subject email was sent on August 5, 2010, petitioner contends that he did not learn of the email until May 2011. Petitioner must provide a reasonable excuse for the delay. **Strauss v. New York City Transit Auth., 195 A.D.2d 322 (1<sup>st</sup> Dept. 1993)**. Petitioner argues that he has a reasonable excuse because he first saw the email on July 19, 2011, ten months after the date of the email. Although this court finds that this was a reasonable excuse, petitioner fails to satisfy the other two elements of G.M.L. § 50-e(5).

Mere possession of records related to the email and petitioner's billing does not satisfy the second factor to be considered if the records do not contain sufficient essential facts of the claim. **Williams v. Nassau County Med. Ctr., 6 N.Y.3d 531 (2006)**. "What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the 'claim.'" **Thomann v. City of Rochester, 256 N.Y.165, 172 (1931)**. In the case at bar, respondent had no reason to anticipate petitioner's claim of defamation. Without the Notice of Claim, respondent was unable to conduct an investigation into the facts surrounding the incident.

Petitioner has also failed to show that respondent will not be substantially prejudiced if petitioner is allowed to file a late Notice of Claim. A timely Notice of Claim would have allowed respondent to conduct an investigation into the facts surrounding petitioner's defamation claim. Respondent has lost the opportunity to do so.

It should also be noted that applications for leave to file a late notice of claim are inappropriate for meritless claims. See, **Matter of Hess v. West Seneca Cent. School Dist., 15 N.Y.3d 813 (2010)**; **Matter of Catherine G. v. County of Essex, 3 N.Y.3d 175 (3<sup>rd</sup> Dept. 2006)**. Statements made within a public employee's duties are subject to an absolute privilege

and therefore immune from suit. Stukuls v. State of New York, 42 N.Y.2d 272 (1977). An absolute privilege is generally afforded to individuals participating in a public function. Toker v. Pollak, 44 N.Y.2d 211 (1978).

A qualified privilege exists only in the absence of malice. Andrews v. Gardiner, 224 N.Y. 440 (1918). "When a speaker communicates information on a subject matter in which 'he has an interest, or in reference to which he has a duty' and such information is communicated to a person with a corresponding interest or duty, a qualified privilege exists." Kaplan v. MacNamara, 116 A.D.2d 626, 627 (2<sup>nd</sup> Dept. 1986) quoting Byam v. Collins, 111 N.Y.143, 150 (1888). The onus is upon petitioner to show that respondent acted with actual malice. Park Knoll Assoc v. Schmidt, 59 N.Y.2d 205 (1983). Petitioner must show that respondent "acted out of personal spite or ill will, with reckless disregard of the statement's truth or falsity, or with a high degree of belief that their statements were probably false." Foster v. Churchill, 87 N.Y.2d 744 (1996).

Here, Ms. Bacigalupi's email was in response to an inquiry made by the Hon. Melissa Jackson, the Criminal Court Supervising Judge. Employees of the CJC and the judiciary have a common interest in reviewing and approving vouchers submitted by attorneys in the ACP. Therefore, Ms. Bacigalupi's email is subject to a qualified privilege. Moreover, this court finds that petitioner has failed to prove that the email was sent with the actual malice necessary to overcome respondent's qualified privilege.

Accordingly, it is hereby,

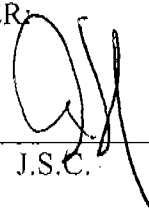
ADJUDGED, that the petition for permission to serve a late Notice of Claim against respondent is denied.

Dated: December 13, 2011

**FILED**

ENTER

DEC 20 2011

  
\_\_\_\_\_  
J.S.C.

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