Lubin v City of New York
2012 NY Slip Op 30671(U)
February 14, 2012
Sup Ct, Queens County
Docket Number: 25349/11
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Azaka Lubin,

Petitioner,

- against -

The City of New York, New York City Department of Transportation,

Respondents.

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Index Number: 25349/11

Motion Date: 2/7/12

Motion Cal. Number: 16

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this petition for leave to file a late notice of claim, nunc pro tunc.

	Papers Numbered
Notice of Petition-Affirmation-Exhibits............	1-4
Affirmation in Opposition-Exhibits.................	5-7
Reply..	8-9

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner for leave to serve late notices of claim, nunc pro tunc, pursuant to General Municipal Law §50-e(5), is denied and the petition is dismissed.

Petitioner allegedly sustained injuries when the motor vehicle in which he was a passenger struck an open manhole on the Van Wyck Expressway in Queens County (no more precise a description of the location of the accident was set forth by petitioner either in his petition or his previously-filed notices of claim) on May 16, 2011.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioner's counsel filed notices of claim with respondents on November 7, 2011, 85 days after the expiration of the statutory 90-day period.

[* 2]

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to proffer an adequate excuse for his delay in filing a notice of claim.

He avers in his affidavit and petition that he was unable to attend to his affairs from the date of the accident until November 2011 due to his injuries and medical treatment. Specifically, he avers that after his accident, he was brought to Jamaica Hospital where he was treated and released and told to follow up with physicians for left knee and neck pain. He began treating on some unspecified date with an orthopedist and a neurologist, and embarked upon a program of conservative management and rehabilitation therapy. On September 23, 2011, he underwent arthroscopic knee surgery. He avers that he has been in constant pain from the date of the accident to the present. He also avers that he contacted his now attorney on November 4, 2011. He also further qualified his earlier statement that he was unable to attend to his affairs due to his injuries and medical treatment by stating that his inability to attend to his affairs was emotional.

If petitioner, by his averment that his "emotional inability to attend to my affairs due to this accident" he intended to mean that he was unable to file a timely notice of claim, a characterization of his averment that his attorney makes in his affirmation, such allegation is unsupported by the affirmation of a physician (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]). Petitioner's averments do not, of themselves, establish an obvious reasonable basis for his failure to serve a timely notice of claim. The Court notes that after his accident he was treated and released from the hospital and thereafter continued treatment and had arthroscopic knee surgery on

an outpatient basis. There is no indication or allegation that he was confined to the hospital or at home and was physically incapacitated, and his injuries were not so obviously severe that common sense would dictate, even absent an affirmation from a physician, that he would be unable to file a timely notice of claim. Moreover, that he was emotionally unable to attend to his affairs is not obvious or reasonable based upon his averments alone so as to render unnecessary an affirmation of a psychiatrist. Also, nothing contained in the copies of medical records annexed to the petition indicates that he was unable to file a timely notice of claim.

Thus, petitioner has failed to proffer any probative evidence that he was incapacitated to such an extent that he could not have complied with the statutory requirement to file the notice of claim in a timely manner (see Bergmann v. County of Nassau, 297 A.D.2d 807 [2d Dept. 2002]).

The contention of petitioner's counsel that respondents acquired timely actual knowledge of the facts underlying petitioner's claim by virtue of the fact that "upon information and belief" an accident report was filed, that City workers were present at the site of the accident due to ongoing construction, and that the City created the condition of the open manhole is without merit.

A police accident report, in and of itself, does not constitute actual notice to the municipality of the essential facts constituting the claim (see State Farm Mut. Auto. Ins. Co. v New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]; Dominguez v Continental Ins. Co. v City of Rye, 257 AD 2d 573 [2nd Dept 1999])). The filing of a police accident report may be considered as comprising part of the information constituting actual notice to the municipality where the report connects the accident to negligence on the part of the municipal agency and where there was further investigation conducted by the City (see Hardayal v City of New York, 281 AD 2d 593 [2nd Dept 2001]; Caselli v. City of New York, supra). Petitioner has failed to demonstrate that such was the case here. Indeed, no accident report is annexed to the petition at all. Counsel merely contends that an accident report was filed "upon information and belief" and summarily leaps to the speculative conclusion that the City must thereby have acquired actual knowledge of the facts underlying petitioner's claim.

Moreover, the municipality does not acquire actual knowledge of the facts underlying the claim merely because its employees were at the scene of the accident and may have had general knowledge that a wrong had been committed (see Morrison v. NYC Health and

Hospitals Corp., 244 AD 2d 487 [2nd Dept 1997]). Indeed, no evidence has been proffered that City workers were present at the location of the accident at all.

In addition, counsel's contention that the City acquired actual knowledge of the essential facts underlying petitioner's claim because the City workers created the condition of the roadway is without merit.

In the first instance, counsel's bare assertion, without any evidence, that City workers created the condition fails to establish that respondents acquired actual knowledge of the facts underlying the claim (see Carbone v Town of Brookhaven, 176 AD 2d 778 [2nd Dept 1991]).

In any event, this is not a situation where a municipal employee was actually involved in the accident that resulted in petitioner's injuries, in which case actual knowledge may, under certain circumstances, be imputed to the municipality. Instead, it is merely claimed that City workers created the defective condition of the roadway through their road work, and that defective condition at some later time caused the accident. Plaintiff's counsel confuses the concept of actual knowledge with the concept of prior written notice. While the creation by the City, through an affirmative act of negligence, of a condition of the roadway that subsequently results in an injury to a third party is an exception to the prior written notice requirement (see Amabile v. City of Buffalo, 93 NY 2d 471 [1999]), this exception has nothing to do with the actual knowledge exception to the notice of claim requirement. There is no controlling case law holding that the creation of a street defect or dangerous condition by City construction workers invests the City with actual knowledge of the facts of a claim related to that condition which arises at some time in the future. "What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]). Thus, even if, arguendo, it were established that workers employed by the Department of Transportation removed the cover from the subject manhole and left the manhole open, such fact would have nothing to do with the issue of whether the City acquired timely actual knowledge of the essential facts of petitioner's subsequent claim, which were those events concerning the accident itself.

Finally, petitioner contends that leave to serve a late notice of claim should be granted because the City would suffer no prejudice. However, petitioner has failed to meet his affirmative

burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]). In any event, the Court finds that the City would suffer substantial prejudice by the inordinate delay of almost 3 months in serving a notice of claim. Moreover, the Court notes that the notices of claim heretofore served on November 7, 2011, which petitioner wishes the City to accept nunc pro tunc, fails to apprise the City of the specific place where and the manner in which the claim arose. They merely claim that the accident occurred on the Van Wyck Expressway due to a dangerous condition described in over a page of general, boilerplate language that does not identify the nature of the condition, where along the many miles of roadway constituting the Van Wyck Expressway the condition existed and the claim arose or the manner in which the claim arose. Thus, these notices of claim are entirely inadequate, even had they been timely served, and could not be deemed filed nunc pro tunc. Instead, petitioner would have been required to serve a new, adequate, notice of claim, which, as of this date, would be almost 6 months late.

Finally, even if there were no prejudice, it would be an abuse of discretion to grant the instant petition where petitioner has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]). Indeed, counsel's contention that the City would suffer no prejudice is based upon his unmeritorious arguments that petitioner had a reasonable excuse for his delay and that the City acquired timely actual knowledge of the facts constituting the claim.

Under the totality of the circumstances, it would be an improvident exercise of this Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this petition.

Accordingly, the application is denied and the petition is dismissed. The City may enter judgment accordingly.

Dated: February 14, 2012

KEVIN J. KERRIGAN, J.S.C.