

**Matter of West-Lee v Dormitory Auth. of the State of
N.Y.**

2012 NY Slip Op 31117(U)

April 19, 2012

Supreme Court, New York County

Docket Number: 109334/11

Judge: Joan A. Madden

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.

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

PRESENT:

PART 11

Index Number : 109334/2011

WEST-LEE, JASON

vs

DORMITORY AUTHORITY

Sequence Number : 001

LEAVE SERVE LATE NOT. OF CLAIM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion *to* leave to serve

late notice of claim.
PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* is decided in accordance with the *unfiled memorandum Decision Order + Judgment*

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served ~~by~~ *by* person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 19, 2012

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

IN THE MATTER OF THE CLAIM OF JASON
WEST-LEE,

INDEX NO. 109334/11

Petitioner,

-against-

DORMITORY AUTHORITY OF THE STATE OF NEW
YORK,

Respondent.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

JOAN A. MADDEN, J.:

Petitioner Jason West-Lee moves for an order pursuant to General Municipal Law §50-e(5), granting him leave to serve a late notice of claim upon respondent Dormitory Authority of the State of New York ("Dormitory Authority"). Dormitory Authority opposes the application, and seeks to change venue to the Supreme Court, Albany County.

Background

Petitioner alleges that he sustained serious injuries on April 5, 2011, when the ceiling collapsed as he was performing construction work in an apartment on the second floor of the building located at 364 West 119th Street, New York, NY (hereinafter "the Building"). Petitioner retained counsel on April 7, 2011. A notice of claim should have been served by July 5, 2011.

According to the affirmation of petitioner's counsel, on April 27, 2011, she sent a letter to the party identified by a real estate transaction search as the owner of the Building. On May 19, 2011, that party contacted petitioner's counsel and informed her that Building had been sold to the City of New York ("the City"), and petitioner filed a notice of claim on the City on June 7, 2011. Then, on August 1, 2011, petitioner's counsel received an email from Kimberly Ryan of the Dormitory Authority who purportedly advised her that the Dormitory Authority owned the

Building and asked that the notice of claim served on the City be faxed to her, and that same day, petitioner's counsel faxed Ms. Ryan the notice of claim.

On August 23, 2011, petitioner made this application for leave to serve a late notice of claim on the Dormitory Authority. The application is supported by petitioner's affidavit and various documentary evidence. Petitioner argues that the delay in serving the Dormitory Authority was the result of law office failure as it was believed that the City, and not the Dormitory Authority, was the owner of the Building. In addition, petitioner argues that even if the excuse of law office failure is found to be unreasonable, leave to serve the notice of claim should be granted as the Dormitory Authority had notice of petitioner's claim on August 1, 2011, less than a month after the expiration of the 90-day period, when petitioner faxed it the notice of claim that petitioner served on the City. In addition, petitioner argues that the Dormitory Authority has not been prejudiced by the delay as the defect causing petitioner's injuries still exists.

Dormitory Authority opposes the application on the grounds that it does not own the Building and submits the affidavit of Ms. Ryan who states that she informed petitioner that the State of New York, and not the Dormitory Authority, owns the Building. The Dormitory Authority notes that the deed search attached to the moving papers shows that the State of New York owns the Building. Moreover, Dormitory Authority argues that the petition is defective as the application should have been commenced in the Supreme Court, Albany County, the proper venue for an action against the Dormitory Authority. See Tripodi v. State of New York Dormitory Authority, 82 AD2d 754 (1st Dept 1981).

In addition, Dormitory Authority argues that leave to serve a late notice of claim should be denied as petitioner has not shown that he made an excusable error in identifying the

appropriate entity to sue. Notably, however, Dormitory Authority does not deny that it had actual notice of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter and does not argue that it will be prejudice by any delay.

Discussion

General Municipal Law §50-e(1)(a), which is applicable to the Dormitory Authority pursuant to Public Authorities Law § 1691, requires a complainant to serve a notice of claim on an municipal entity within 90 days after the claim arises. Pursuant to GML §50-e(5), the court in its discretion may extend the time to serve a notice of claim. An application to serve a late notice of claim may be made before or after the commencement of an action, but not more than one year and 90 days after the cause of action has accrued, unless the state of limitations has been tolled. GML §50-e(5); GML §50-i; Pierson v. City of New York, 56 NY2d 950 (1982). In determining whether to grant leave to serve a late notice of claim, various factors must be considered, including whether a petitioner has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the entity acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the entity in maintaining its defense. General Municipal Law § 50-e(5); Strauss v. New York City Transit Authority, 195 AD2d 322 (1st Dept 1993). The presence or absence, however, of any one factor is not necessarily dispositive. Matter of Nayyar v. Board of Education of the City of New York, 169 AD2d 628, 629 (1st Dept 1991).

As a preliminary matter, with respect to the venue of this proceeding, Subdivision 7 of section 50-e provides that application to serve a late notice of claim shall be made in either (a) a county where the action may be tried; (b) a county where an action to enforce the claim is already pending; or (c) an adjoining county where no motion term is available in either of the above.

Here, the proper venue of this proceeding appears to be Albany County, which is the location of the Dormitory Authority's principal office, and thus the place where any action against the Dormitory Authority must be commenced and tried. Tripodi v. State of New York Dormitory Authority, 82 AD2d 754. That being said, however, an allegedly improper venue "is no jurisdictional impediment." Kurfis v. Shore Towers Condominium, 48 A.D.3d 300, 301 (1st Dept 2008). Thus, even when venue is placed in the wrong county when a party challenging venue fails to follow the proper procedure, venue need not be transferred. Id. Here, Dormitory Authority did not serve a demand to change venue as required by statute nor did it formally move to change venue. Accordingly, the request to change venue of this proceeding is denied, without prejudice to the Dormitory Authority seeking to change venue in the event that petitioner does not commence the plenary action in the proper county.

Next, the Dormitory Authority's argument that leave to serve the late notice of claim should be denied as it does not own the Building is without merit. "Ordinarily, courts should not delve into the merits of an action in determining an application to file a late notice except in the rare case where the claim is patently meritless" See, Weiss v City of New York, 237 AD2d 212, 213 (1st Dept 1997)(internal citation and quotation omitted). Here, as noted by petitioner in reply, the allegations against the Dormitory Authority are not based solely on its ownership of the Building but also on Dormitory Authority's operation, maintenance and control of the Building.

With respect to the merits of the application, petitioner has made a sufficient showing to be entitled to the requested relief. The Dormitory Authority does not deny that it had notice of the essential facts underlying the claim during the 90-day period. See, Ayala v City of New York, 189 AD2d 632, 634 (1st Dept 1993). In any event, the record demonstrates that the Dormitory Authority received the notice of claim served on the City less than a month after the

6
expiration of the 90-day period which is reasonable under the circumstances here. Id.; see also Rosenblatt v The City of New York, 160 AD2d 927, 928 (2d Dept 1990). Additionally, the Dormitory Authority does not allege it has been prejudice as a result of the delay.

Under these circumstances, even assuming that law office failure does not constitute an adequate excuse for petitioner's failure to timely serve the notice of claim, the absence of such excuse does not warrant the denial of petitioner's application. See, e.g., Matter of Nayyar v. Board of Education of the City of New York, supra at 629; Swensen v. City of New York, 126 AD2d 499, 501 (1st Dept 1987).

Conclusion

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, and the proposed notice of claim annexed to petitioner's papers shall be deemed served upon service of a copy of this order with notice of entry on the Dormitory Authority, and petitioner shall complete said service within 30 days of the date of the entry of this order and judgment.

Finally, the Court notes that this decision is a final disposition of petitioner's application, and that petitioner must commence a plenary action under a new index number.

DATED: ~~March 1, 2012~~

April 19, 2012



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).