

Matter of Brooks v Town of N. Hempstead
2012 NY Slip Op 31354(U)
May 8, 2012
Supreme Court, Nassau County
Docket Number: 17003/11
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

-----x
In the Matter of the Application of

SHERRY BROOKS,

Index No: 17003/11

Petitioner,

- against -

TOWN OF NORTH HEMPSTEAD

Respondent.
-----x

DECISION AND ORDER

Motion Sequence No: 001

Original Return Date: 12-22-11

P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 5 were submitted on this Notice of Motion on March 1, 2012:

Papers numbered

Order to Show Cause, Affirmation and Affidavit	1-3
Affirmation in Opposition	4
Reply Affirmation	5

This proceeding by the petitioner, Sherry Brooks, for an Order pursuant to General Municipal Law §50-e(5), granting her leave to serve a late Notice of Claim upon the respondent, Town of North Hempstead is decided as follows.

Briefly, this action arises out of a trip and fall accident that took place on September 24, 2010 at or about 4:00 p.m. when the petitioner, while crossing the street at Prospect Avenue and Maplewood Drive in Westbury, New York, allegedly was caused to step into a hole in the street, resulting in serious personal injuries. She claims that her consequent fall to the ground was a result of the dangerous and defective condition.

On December 22, 2010, petitioner served Notices of Claim upon the County of Nassau, the Town of Hempstead and the Incorporated Village of Westbury. Subsequently, on September 27, 2011, a 50-h hearing was held. In support of the instant application, counsel for the petitioner states that at her municipal law hearing, petitioner's testimony provided specific information as to the location of the accident and that it was at that point that he determined that the occurrence took place at or near two adjoining towns, to wit: the Town of Hempstead and the Town of North Hempstead. Accordingly, on December 1, 2011, petitioner served a Notice of Claim upon the Town of North Hempstead. Said Notice of Claim was rejected by the Town.

With this application dated December 7, 2011, petitioner seeks leave to file and serve a late Notice of Claim upon the Town of North Hempstead.

In opposition to the motion, the Town of North Hempstead asserts three principal arguments. First, the Brooks' petition is brought almost 12 months after the initial 90 days within which the Notice of Claim should have been filed and 16 days before the expiration of the one year and 90 days statute of limitations. Second, given that the claimant has lived within blocks of the accident site for 40 years and who testified at her 50-h hearing that she was "familiar with the general area of the accident," her claim that she "could not determine as a matter of fact whether" she fell in the Town of Hempstead or the Town of North Hempstead is "unreasonable, insufficient and incredible" (Aff. In Opp., ¶4). Lastly, according to the petitioner's testimony, the roadway has since been resurfaced and the alleged defective condition has been repaired and corrected; thus, the extraordinary delay has prejudiced the Town's investigation of the claim.

Pursuant to General Municipal Law § 50-e(5), this Court may permit the service of a late Notice of Claim under certain circumstances. The statute reads:

5. Application for leave to serve a late notice.

1. Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section. * * * * In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; if service of the notice of claim is attempted by electronic means pursuant to paragraph (e) of subdivision three of this section, whether the delay in serving the notice of claim was based upon the failure of the computer system of the city or the claimant or the attorney representing the claimant; that such claimant or attorney, as the case may be, submitted evidence or proof as is reasonable showing that (i) the submission of the claim was attempted to be electronically made in a timely manner and would have been completed but for the failure of the computer system utilized by the sender or recipient, and (ii) that upon becoming aware of both the failure of such system and the failure of the city to receive such submission, the claimant or attorney had insufficient time to make such claim within the permitted time period in a manner as otherwise prescribed by law; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Thus, in this case, the relevant factors for the Court to consider include (1) proof that the municipality acquired actual knowledge of the facts constituting the claim within ninety days from its accrual or a reasonable time thereafter, (2), whether the application provides a reasonable excuse for failing to serve a timely notice of claim, and (3) a showing of whether the delay substantially prejudices the municipality in maintaining its defense on the merits (General Municipal Law 50-e(5); *Matter of Padovano v. Massapequa Union Free School Dist.*, 31 AD3d 563 [2nd Dept. 2006], citing *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531 [2006]). Furthermore, while a balancing test of all the relevant factors will be employed by this Court in deciding whether to grant

the instant application, the most important factor remains the respondent's actual knowledge of the essential facts constituting the petitioner's claim and whether it was acquired within the ninety day time period to file a Notice of Claim or within a reasonable time after the running of the time to file a Notice of Claim. Indeed, the statute sets this one factor apart from all the others; none of the remaining factors are "necessarily determinative" (*Casias v. City of New York*, 39 AD3d 681 [2nd Dept. 2007]).

In that regard, this Court notes that here, there is no indication in the record that the respondent Town of North Hempstead had actual knowledge of the facts essential to the claim within 90 days of the accident or a reasonable time thereafter. "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" (*Matter of Sica v. Board of Educ. of City of N.Y.*, 226 AD2d 542 [2nd Dept. 1996]). Thus, petitioner's argument in reply that knowledge of the existence of its contract with a private company for the repair and paving of roads in the Town, including the road upon which Petitioner allegedly slipped and fell, demonstrates that the work was necessary is entirely unavailing. The existence of a contract and knowledge of repair work being performed does not evidence notice of the petitioner's claim.

Petitioner argues that:

The very fact that the TOWN OF NORTH HEMPSTEAD executed the contract [with Anthony Enterprises for the repair and paving of certain roads in the Town] clearly demonstrates...[the Town] knew that the work was being performed [sic] on roadways in their Town, which included the roadways where Petitioner had her fall[,]...they had access and still have access to any and all work records and daily logs for the work performed [sic] by the contractor showing the condition of the roads as the job was ongoing[,]...[and thus] there is absolutely ***no prejudice*** whatsoever demonstrated by the Respondent in this proceeding.(Reply Aff., ¶5f.).

This argument is without merit.

This Court is not persuaded that the petitioner, having been represented by counsel at all times, did not know that the accident site was within the Town of North Hempstead. The petitioner's failure to ascertain the respondent's ownership and/or maintenance of the accident site does not constitute a reasonable excuse, since she has failed entirely to demonstrate that either she or her counsel made any effort to investigate or research the ownership and maintenance issue in the first place (*Bridgeview at Babylon Cove Homeowners Assn., Inc. v. Incorporated Vil. of Babylon*, 41 AD3d 404, 405–406 [2nd Dept. 2007]; *Matter of Nieves v. Girimonte*, 309 AD2d 753, 754 [2nd Dept. 2003]).

Nonetheless, even assuming that the petitioner's erroneous belief that the accident site was within the Town of Hempstead constitutes a reasonable excuse for her delay (*Matter of Flynn v. Town of Oyster Bay*, 256 AD2d 341 [2nd Dept. 1998]; *Matter of Goldberg v. County of Suffolk*, 227 AD2d 482 [2nd Dept. 1996]), the fact is that the respondent did not have any notice of the facts underlying the petitioner's claim until she sought leave to serve a late Notice of Claim upon them.

Furthermore, given the transitory nature of the alleged defect in the pavement of the street, this Court concludes that the delay herein has indeed prejudiced the respondent's ability to investigate the defect and other circumstances surrounding the accident (*Papayannakos v. Levittown Mem. Special Educ. Ctr.*, 38 AD3d 902, 903 [2nd Dept. 2007]; *Matter of Gofman v. City of New York*, 268 AD2d 588 [2nd Dept. 2007]).

Therefore, after due deliberation, it is

ORDERED, that the motion by petitioner, Sherry Brooks, for an Order pursuant to General Municipal Law §50-e(5), granting her leave to serve a late Notice of Claim upon the respondent,

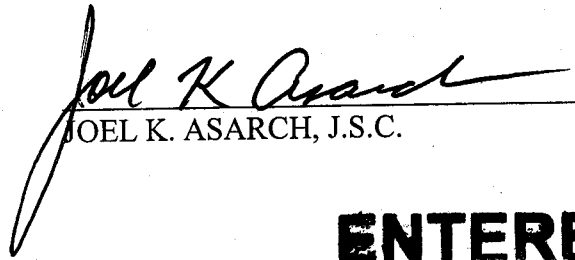
Town of North Hempstead is **denied**.

The parties' remaining contentions have been considered and do not warrant discussion.

This shall constitute the Decision and Order of the Court.

Dated: Mineola, New York
May 8, 2012

ENTER:

A handwritten signature in black ink, appearing to read "Joel K. Asarch", is written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Leo Tekiel, Esq.
Attorneys for Petitioner

Richard S. Finkel, Esq.
Attorneys for Respondent

ENTERED
MAY 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE