

Turner v City of New York

2012 NY Slip Op 31980(U)

July 23, 2012

Sup Ct, NY County

Docket Number: 102555/12

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

JEFFREY TURNER

- v -

The City of N.Y.

INDEX NO. 102555/12
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUL 26 2012

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Dated: 7/23/12
JUL 23 2012

BARBARA JAFFE
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
JEFFREY TURNER,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.
-----X

Index No. 102555/12

Argued: 6/19/12
Motion Seq. No. 001

DECISION AND ORDER

FILED

JUL 26 2012

BARBARA JAFFE, JSC:

For petitioner:
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NEW YORK
COUNTY CLERK'S OFFICE
For respondent:
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By order to show cause dated April 23, 2012, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order granting him leave to serve respondent with a late notice of claim, *nunc pro tunc*. Respondent opposes.

I. BACKGROUND

On October 18, 2011, petitioner, who resides out-of-state, allegedly slipped off a piece of wood at his job site in Valhalla, New York, sustaining physical injuries. (Affirmation of Joseph N. Cotilletta, Esq. dated Apr. 23, 2012 [Cotilletta Aff.], Exhs. A, B). During the two months following the accident, he continued to work while also traveling to a rehabilitation facility for treatment three times a week. (*Id.*, Exh. B).

On or about January 17, 2012, petitioner retained counsel, and on January 23, 2012, he signed the verification for his notice of claim (*id.*, Exh. D) but never served respondent with it (Affirmation of Leslie D. Knight, ACC, in Opposition, dated June 18, 2012 [Knight Opp. Aff.]). Thereafter, his counsel investigated his claim, and on March 20, 2012 determined that respondent

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owns the accident site. (Cotilletta Aff., Exh. C).

By sworn petition dated April 16, 2012, petitioner states, *inter alia*, that he filed an accident report with “the safety people on-site who also took pictures of the accident scene and presumably notified the owner of the property.” (*Id.*, Exh. B).

II. CONTENTIONS

Petitioner claims that his delayed filing is excused by his residence out-of-state, his rehabilitation and work schedule, which hindered his ability to retain counsel, and his counsel’s investigation of the accident site’s ownership. (Cotilletta Aff.). He asserts that City obtained actual notice of the facts underlying his claim from the accident report he filed with on-site safety personnel. (*Id.*).

In opposition, respondent denies that petitioner has offered a reasonable excuse for his delayed filing, as he fails to explain the three-month delay between his counsel’s discovery that the accident location is owned by respondent and the filing of the instant order to show cause and to offer any documentation of his physical inability to file a notice of claim, and mistakes as to ownership of an accident location do not excuse late filing. (Knight Opp. Aff.). Moreover, respondent denies having received notice of the facts underlying petitioner’s claim absent any proof that the safety personnel were its employees or that the report was transmitted to it. (*Id.*). And it maintains that its ability to investigate the accident has been hindered by petitioner’s delay. (*Id.*).

III. ANALYSIS

Pursuant to GML §§ 50-e(1)(a) and 50-i, in order to commence a tort action against a municipality, 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

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to grant the extension, it must consider, *inter alia*, whether the municipality 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 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]). No one factor 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 consider other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

Here, absent any evidence that the on-site safety personnel were employed by respondent or that the accident report was transmitted to it, petitioner has failed to establish that it obtained actual knowledge of the facts underlying his claim. (See *Washington v New York*, 72 NY2d 881 [1988] [plaintiff failed to demonstrate actual knowledge in “conclusorily alleging the existence of an accident report and offering no reliable basis to support his claim that the accident was reported to” municipal employees]; *Matter of Liebman v New York City Dept. of Educ.*, 69 AD3d 633 [2d Dept 2010] [petitioner failed to demonstrate actual knowledge absent evidence that respondents were served with accident report]; *Matter of Bruzzese v City of New York*, 34 AD3d 577 [2d Dept 2006] [petitioner failed to demonstrate actual knowledge where his “assertion that an incident report was filed with the City is completely unsubstantiated by the record and was refuted by evidence submitted by the City”]; *Matter of Martinez v New York City Hous. Auth.*, 250 AD2d 686 [2d Dept 1998] [petitioner failed to demonstrate actual knowledge where there was no evidence reflecting that police report was disclosed to municipal respondent]).

As petitioner failed to demonstrate actual knowledge, and as he fails to substantiate his

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assertion that there exist photographs of the accident site as it existed the day of his accident, he has also failed to demonstrate that his delay has not prejudiced respondent's ability to investigate his claim. (See *Lyerly v City of New York*, 283 AD2d 647 [2d Dept 2001] [as "petitioner's contention that the [municipality] would not be prejudiced . . . is predicated on the incorrect assumption that [it] acquired actual knowledge . . . , she also failed to demonstrate absence of prejudice"]).

And, absent any authority for the proposition that the location of a claimant's residence out of state excuses his failure to file a late notice of claim, any explanation as to the delay between his attorney's discovery that respondent owns the accident site and the filing of the instant order to show cause, or any documentation of his physical inability to file a notice of claim, he offers no excuse for his delay.

IV. CONCLUSION

Accordingly, it is hereby


ORDERED, that petitioner's motion for leave to serve a late notice of claim, *nunc pro tunc*, is denied.

FILED

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COUNTY CLERK'S OFFICE



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: July 23, 2012
New York, New York

[JUL 23 2012