

Kam Wo Lee v City of New York

2012 NY Slip Op 33308(U)

January 3, 2012

Sup Ct, NY County

Docket Number: 108735/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Jaffe BARBARA JAFFE
Justice J.S.C.

PART 5

Index Number : 108735/2011
LEE, KAM WO
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 108735/11
MOTION DATE 10/4/11
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

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NYS SUPREME COURT - CIVIL

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/12
JAN 03 2012

BARBARA JAFFE J.S.C.
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 5

-----X
KAM WO LEE,

Plaintiff/Petitioner,

-against-

Index No. 108735/11

Argued: 10/4/11

Motion Seq. No.: 001

Motion Cal. No.: 135

DECISION AND ORDER

THE CITY OF NEW YORK and NEW YORK CITY
HOUSING AUTHORITY,

Defendants/Respondents.
-----X

BARBARA JAFFE, J.S.C.:

For plaintiff:

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JAN 09 2012

NEW YORK

For defendant NYCHA:

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125 Broad Street
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212-471-8500

By order to show cause dated July 27, 2011, plaintiff/petitioner (hereinafter plaintiff)

moves pursuant to General Municipal Law (GML) § 50-e for an order granting leave to serve a late notice of claim. Defendant/respondent New York City Housing Authority (NYCHA) opposes.

By notice of motion dated August 16, 2011, NYCHA moves pursuant to GML § 50-e and Public Housing Law § 157 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On May 5, 2010, plaintiff tripped and fell on an uneven portion of sidewalk adjacent to the Alfred E. Smith Houses (Smith Houses), a NYCHA-owned housing development located at 26 Madison Street in Manhattan. (Affirmation of Dana M. Whitfield, Esq., dated July 22, 2011 [Whitfield Aff.], Exh. C).

On or about July 26, 2010, plaintiff served defendant/respondent City with a notice of

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claim, and only after NYCHA failed to schedule a GML § 50-h hearing did she realize that she failed to serve it with same. (*Id.*).

By affidavit dated July 22, 2011, which was translated from Cantonese to English by plaintiff's daughter, plaintiff states that on or about July 20, 2010, she observed that the defect on which she had tripped had been repaired. (*Id.*, Exh. D).

On or about July 28, 2011, plaintiff served NYCHA with a summons and verified complaint. (Affirmation of Neil R. Finkston, Esq., dated Aug. 16, 2011 [Finkston Aff.], Exh. A).

By affidavit dated August 15, 2011, Jason Stram, Assistant Property Maintenance Supervisor for the Smith Houses, states that he is "familiar with NYCHA procedures regarding the maintenance of the external grounds of the Smith Houses [and] the public perimeter sidewalk around the development" and its preparation and preservation of records regarding same, and that NYCHA neither performed nor "direct[ed], retain[ed], or arrange[d] for" the post-accident repairs. (Affirmation of Neil R. Finkston, Esq., in Opposition, dated Aug. 16, 2011 [Finkston Opp. Aff.], Exh. A).

II. CONTENTIONS

Plaintiff asserts that her failure to serve NYCHA with a notice of claim resulted from inadvertent law office error, that NYCHA obtained actual knowledge of the facts underlying her claim through the post-accident repairs to the sidewalk on which she tripped and fell, and that it will not be prejudiced by her late filing as a result. (Whitfield Aff.).

In opposition, and in support of its motion to dismiss, NYCHA denies having repaired the sidewalk, and even if it had, that it would not have obtained actual knowledge of plaintiff's accident in doing so, that its ability to investigate has been prejudiced by plaintiff's delay, as the

defect no longer exists, and that the complaint must be dismissed for plaintiff's failure to file timely a notice of claim or demonstrate entitlement to late filing of same. (Finkston Opp. Aff.; Finkston Aff.). Moreover, it claims that plaintiff's affidavit is inadmissible absent an attestation from her daughter regarding her translation. (Finkston Opp. Aff.).

In reply, and in opposition to NYCHA's motion to dismiss, plaintiff observes that NYCHA has failed to demonstrate that it did not repair the sidewalk, and thus, that it did not obtain actual knowledge of her accident, and asserts that her summons and complaint provided it with actual knowledge of the facts underlying her claim. (Affirmation of Dana M. Whitfield, Esq., in Opposition, dated Aug. 30, 2011; Affirmation of Dana M. Whitfield, Esq., in Reply, dated Sept. 2, 2011).

III. ANALYSIS

Pursuant to GML §§ 50-e(1)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, 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 to grant the extension, it must consider, *inter alia*, whether the municipality or agency 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 or agency 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]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6

NY3d 531, 539 [2006]). In considering these factors, none 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 take into account all other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

1. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). A municipal agency has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the agency. (*Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 [2d Dept 2010]).

Here, absent evidence demonstrating that NYCHA repaired the sidewalk and learned about plaintiff's accident in doing so, plaintiff has failed to establish that it obtained actual knowledge of the facts underlying her claim. And, any actual knowledge conveyed in the summons and complaint was obtained by NYCHA more than a year after plaintiff's accident. She has thus failed to demonstrate that NYCHA obtained actual knowledge of the essential facts underlying her claim within 90 days of her accident or a reasonable time thereafter. (*Compare Matter of Godwin v Town of Huntington*, 56 AD3d 671 [2d Dept 2008] [plaintiff failed to demonstrate actual knowledge within 90-day period or a reasonable time thereafter on basis of service of summons and complaint 11 months after accident] *with Miller v County of Sullivan*, 36 AD3d 994 [3d Dept 2007] [municipality obtained actual knowledge when served with summons

and complaint less than 90 days after accident occurred]).

2. Prejudice

A petitioner also bears the burden of establishing a lack of prejudice. (*Matter of Kelley v New York City Health and Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]). “Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay.” (*Williams*, 6 NY3d at 539).

Plaintiff has also failed to demonstrate that NYCHA will not be prejudiced by her late filing.

3. Reasonable excuse

As law office failure, including clerical errors and “mere inadvertence,” does not constitute a reasonable excuse for failing to file a notice of claim timely (*Lyerly v City of New York*, 283 AD2d 647 [2d Dept 2001]; *Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [1st Dept 2000]), petitioner has failed to offer a reasonable excuse for her delay.

As plaintiff neither timely served NYCHA with a notice of claim nor demonstrated entitlement to leave to serve a late one, her complaint is dismissed as against NYCHA.

In light of this determination, NYCHA’s contention as to the admissibility of plaintiff’s affidavit need not be considered.

IV. CONCLUSION

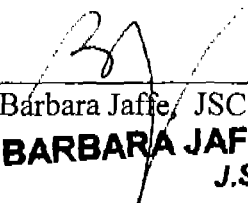
Accordingly, it is hereby

ORDERED, that plaintiff’s order to show cause for an order granting leave to serve a late notice of claim is denied; and it is further

ORDERED, that defendant New York City Housing Authority’s motion to dismiss the

complaint is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant New York City Housing Authority with costs and disbursements to New York City Housing Authority, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of New York City Housing Authority; and it is further ORDERED, that the remainder of the action shall continue.

ENTER:



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

DATED: January 3, 2012
New York, New York

FILED
JAN 09 2012
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