

Colarossi v City of New York

2013 NY Slip Op 31324(U)

June 19, 2013

Sup Ct, New York County

Docket Number: 154632/2012

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT Justice

PART 5

Colanossi, Anthony
-v-
City of New York

INDEX NO. NY632/12
MOTION DATE
MOTION SEQ. NO. 001

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

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):

Dated: 6-19-13
JUN 19 2013

[Signature], J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: [X] CASE DISPOSED
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
ANTHONY COLAROSSO,

Plaintiff,

-against-

DECISION/ORDER
Index No.: 154632/2012
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

THE CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION and WARDS ISLAND POLLUTION CONTROL PLANT,

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....1-2.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....5-7.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS

Plaintiff moves for an Order pursuant to General Municipal Law § 50-e(5), permitting him to serve a late Notice of Claim against defendants. Defendants oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the instant Order To Show Cause.

Factual and procedural background:

Plaintiff brings the instant suit for personal injuries he allegedly sustained on April 18, 2011, when he fell into a hole at the bottom of a sewer treatment tank of Pier 6 in New York County, while performing construction work. Plaintiff asserts that he immediately reported the incident to his employer and job safety employees. Plaintiff subsequently began receiving Workman's Compensation as a result of injuries he sustained in the fall.

Plaintiff's claim derives from a violation of Labor Law §241(6), and more specifically, violations of Industrial Code § 23-1.7(d) and (e). Plaintiff retained the firm of Dervishi, Levine & Morgan, P.C. on July 3, 2012. In an affidavit attached to the instant O.S.C., plaintiff's counsel, Duane R. Morgan, Esq., avers that prior to plaintiff's retention of Dervishi, Levine & Morgan, P.C., plaintiff initially met with another law firm which failed to prosecute his case in a timely manner and also failed to inform him of the 90 day statute of limitations until the end of June. Mr. Morgan also avers that he personally and immediately researched the accident site as well as the construction project, and determined that the record owner was Wards Island Water Pollution Plant, which is managed and controlled by the Department Of Environmental Protection of the City of New York. Counsel files a Summons and Complaint against that record holder, with the instant application.

Positions of the parties:

Plaintiff now proffers several arguments as to why the Court should permit the late filing of his Notice of Claim against the named defendants. He argues that defendants' insurance representative had immediate notice of the subject incident, and had the opportunity to thoroughly follow the progress of plaintiff's medical condition to date; defendants are not prejudiced by the filing of a late Notice of Claim; this application is being made within the time constraints

promulgated by General Municipal Law § 50-e(5); courts have repeatedly allowed plaintiffs to file late Notices of Claim with extensive delays similar to that alleged in the present case; ample grounds exist for the Court to exercise its discretion pursuant to General Municipal Law § 50-e(5); and the interests of justice will be best served by the granting of this application.

Defendants argue that it is undisputed that plaintiff failed to file a timely Notice of Claim within 90 days as statutorily mandated by General Municipal Law § 50-e(5). They cite to the specific component of the statute which provides “[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation.”

Defendants also argue that General Municipal Law § 50-1(1) provides that an application for an extension may not be made more than one year and 90 days after the cause of action accrued, unless the statute has been tolled. Defendants assert that the one year and 90 day statute is calculated by 365 days from the day after the accident and then by counting an additional 90 day period. However, they argue that N.Y. Gen. Construct Law § 58 provides that the term year in a statute, contract, or any public or private instrument means 365 days, but the added day of a leap year and the day immediately preceding, shall for the purpose of such computation, be counted as one day.

Defendants further argue that although the instant Proposed Order To Show Cause was received by the New York County Clerk on July 18, 2012, it was returned for correction on July 31, 2012, and re-submitted after the expiration of the statute of limitations.

Finally, defendants argue that assuming *arguendo*, that plaintiff managed to timely file the application, his request to file a late Notice of Claim still warrants denial because he fails to comply with the criteria set forth in General Municipal Law § 50-e. He fails to proffer a reasonable excuse for his failure, he fails to prove that the municipality had notice of his claim, and fails to demonstrate

how the municipality would not be prejudiced by his non-compliance.

Conclusions of law:

In determining whether to grant leave to serve a late notice of claim, the court must consider whether (1) the claimant had a reasonable excuse for the failure to serve a timely notice of claim, (2) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the public corporation in maintaining its defense on the merits (see General Municipal Law§ 50-e[5]; *Bazile v. City of New York*, 94 A.D.3d 929, 929-30 [2d Dept. 2012]; *Matter of Henriques v. City of New York*, 22 A.D.3d 847, 848 [2d Dept. 2005]). “General Municipal Law§50-e[5] confers upon the court discretion to determine whether to allow filing of a late notice of claim” (*Schiffman v. City of New York*, 19 A.D.3d 206, 208 [1st Dept. 2005]).

The statute of limitations which governs this section is set forth in General Municipal Law §50-e(1), which requires tort actions against municipal defendants to be commenced “within one year and ninety days after the happening of the event upon which the claim is based.” The Court of Appeals has consistently acknowledged that CPLR§ 204(a) tolls the one year and 90 day statute of limitations governing tort claims against municipal defendants while a motion to serve a late notice of claim is pending (see *Ambrus v. City of New York*, 87 A.D.2d 341 [2d Dept. 2011]). The toll has been held to run from the date an application for leave to serve a late notice of claim is made to the date upon which an order granting that relief goes into effect (*Id.*).

In the case at bar, the date of the accident was April 19, 2011. In their Affirmation in Opposition, defendants argue that “[a]lthough the Proposed Order to Show Cause seeking leave to file a Late Notice of Claim was received by the New York County Clerk on July 18, 2012, it was

returned for correction on July 31, 2012 and re-submitted after expiration of the statute of limitations. In the instant case, the last day a timely application could have been made was July 17, 2012 or July 18, 2012, depending on the actual date of loss. Plaintiff's proposed O.S.C. was received by the County Clerk on July 18, 2012. The Court finds that the fact that it was returned for correction on July 31, 2012, and re-submitted after the actual expiration of the statute of limitations is of no consequence, and does not undermine its timeliness.

Moreover, after considering the existence of the additional aforementioned factors, the Court finds that plaintiff has sufficiently proved that defendants had actual notice of his claim, and that defendants have failed to demonstrate how they suffered substantial prejudice. General Municipal Law §50-e[5] provides in pertinent part "[i]n determining whether to grant the extension [of a late notice of claim], the Court shall consider in particular whether the Public Corporation or its attorneys or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in Subdivision 1 or within a reasonable time thereafter....."

Indeed, defendants acquired actual notice of plaintiff's accident via the records maintained and preserved by the insurance company defending the subject claim, Zurich American Insurance Company. It is important to note that defendants do not dispute this particular fact. Defendants were also put on notice by plaintiff's filing of his claim for Worker's Compensation on May 2, 2011, which was well within the statutorily mandated 90 day period.

Therefore, in accordance with the foregoing, it is hereby

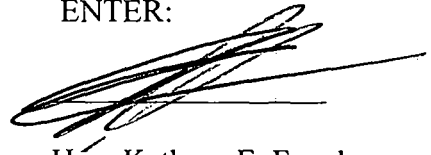
ORDERED that the motion for leave to serve a late notice of claim is granted, and the annexed notice of claim is deemed served upon service of notice of entry of this order; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: June 19, 2013

JUN 19 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT