Nationwide Affinity Ins. Co. of Am. v City of New York
2013 NY Slip Op 31391(U)
May 21, 2013
Sup Ct, Queens County
Docket Number: 5807/13
Judge: Kevin Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Nationwide Affinity Insurance Company of America, as subrogee of Sonia Francis, seeking an order to file a late notice of claim with the City of New York and New York City Transit Authority,

Petitioners,

- against -

City of New York, New York City Transit Authority, and Errol Croft,

Respondents.

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Index Number: 5807/13

Motion Date: 5/13/13

Motion Cal. Number: 75

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this petition for leave to file a late notice of claim.

	Papers Numbered
Notice of Petition-Petition-Exhibits	1-4
Affirmation in Opposition-Exhibit	5-7
Reply	8-9

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner to serve a late notice of claim, pursuant to General Municipal Law §50-e(5) is denied.

A condition precedent to commencement of a tort action against a municipal entity is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]).

It is undisputed that petitioner's subrogee's, Sonia Francis', claim for property damage to her motor vehicle accrued on October 3, 2012 when the vehicle she owned and was operating collided with a bus allegedly owned by the City or the NYC Transit Authority (TA) at the intersection of 89th Avenue and 165th Street in Queens County.

On November 26, 2012, petitioner mailed a notice of claim by regular mail. Petitioner alleges that it mailed the notice of claim to the "City of New York" and that proof of receipt thereof is evidenced by the letter of the TA returning the notice of claim. Counsel for petitioner contends that, therefore, "the City of New York/New York City Transit Authority" had actual knowledge of the accident within 90 days of its occurrence. There is no affidavit of mailing of the notice of claim and the notice of claim itself is not addressed either to the City or the TA. Indeed, it is not addressed to any entity or individual. It appears clear from the submissions on this petition that the notice of claim was served only upon the TA, which is a separate and distinct legal entity from the City (see Bertone Commissioning v. City of New York, 27 AD 3d 222 [1st Dept 2006]; Public Authorities Law §1201, et seq.).

On December 18, 2012, the TA mailed the notice of claim back to petitioner by certified mail under a cover letter apprising it that the notice of claim was being returned because it was not served either personally or by registered or certified mail. Petitioner was also apprised of its right to serve the notice of claim again within 10 days. Petitioner did not re-serve the notice of claim, but instead commenced the instant special proceeding on March 27, 2013 seeking leave to serve a late notice of claim.

Pursuant to General Municipal Law §50-e(3)(b), a notice of claim must be served either by personal delivery or by registered or certified mail. Where service is effected by registered or certified mail, service is complete upon mailing. Here, counsel for petitioner admittedly did not serve the notice of claim either personally or by certified or registered mail, but by regular mail. Section 50-e(3)(c) provides that if the notice of claim was served in a manner not in compliance with §50-e(3), the service will be valid only if 1), it is received within the 90-day period and the public corporation against which the claim is made does not return it to petitioner within 30 days of receipt noting the defect in the manner of service, or 2), if the public corporation demands that petitioner "be examined in regard to it..."

The TA did not make a demand that petitioner be examined, since there was no demand that petitioner appear for a statutory 50-h hearing (see Scantlebury v New York City Health and Hospitals Corp., 4 NY 3d 606 [2005]).

Moreover, it is undisputed that the TA mailed the notice of claim back to petitioner within 30 days after it was received specifying the defect in the manner of service. Therefore, even though the notice of claim was actually received within the statutory 90-day period, since it was not served properly, it was

not valid.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to proffer an acceptable excuse for its delay in properly serving a notice of claim. Petitioner's sole offer of an excuse is that its claims handlers are not attorneys and that they are in Iowa and might overlook procedural rules indigenous to particular jurisdictions. In other words, petitioner is asserting ignorance. However, ignorance of the law regarding the requirements of filing a notice of claim does not constitute a reasonable excuse (see e.g. Felice v. Eastport/South Manor Cent. School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]; D'Anjou v. New York City Health and Hospitals Corporation, 196 AD 2d 818 [2nd Dept 1993]).

In addition, the letter from the TA apprised petitioner that it may serve (properly) a notice of claim again within 10 days of receipt of the letter. Said information reflects the provision of General Municipal Law §50-e(3)(d) which provides that if a notice otherwise timely but improperly served is returned within the specified time, the claimant may serve a new notice properly within 10 days after the returned notice is received and the notice shall thereupon be deemed timely served. No excuse is proffered for petitioner's failure to heed the clear instruction in the TA's letter apprising it that it may serve the notice again within 10 days. No excuse is proffered for petitioner's taking no action thereafter but waiting more than three months before finally seeking leave to serve a late notice of claim.

Counsel's argument that petitioner should be "exempt" from

being required to proffer a reasonable excuse because the notice of claim was, in fact, served within the 90-day period but was rejected "merely" on "procedural grounds" is without merit. The notice of claim, having been served improperly and having been rejected within the prescribed period and not timely re-served was not valid, pursuant to General Municipal Law §50-e. Having been improperly served and, therefore, invalid, the notice was a nullity.

Counsel's additional contention that respondents acquired timely actual notice of the essential facts underlying the claim by virtue of the fact that they actually received the notice of claim is also without merit. Since the notice of claim was not valid, its receipt may not serve as a basis for actual knowledge (see Katsourias v City of New York, __NY2d__, 2013 NY Slip Op 03486 [2nd Dept, May 15, 2013]).

Also without merit is counsel's argument that a police accident report filed with the New York State Department of Motor Vehicles imparted to the TA timely actual knowledge of the facts underlying the claim. The accident report, annexed to the petition, is insufficient to impart actual notice to the TA where there was no evidence that it was "ever filed with or otherwise brought to the attention of the officer of the [TA] designated by law to accept service of a notice of claim" (Caselli v. City of New York, 105 AD 2d 251, 255 [2nd Dept 1984]) and where no further investigation by the TA was conducted concerning the accident.

A police accident report, in and of itself, does not constitute actual notice to the municipal corporation of the essential facts constituting the claim (see State Farm Mut. Auto. Ins. Co. v New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]; Dominquez v Continental Ins. Co. v City of Rye, 257 AD 2d 573 [2nd Dept 1999])). The filing of a police accident report may be considered as comprising part of the information constituting actual notice to the municipal corporation where the report connects the accident to negligence on the part of the municipal agency and where there was further investigation conducted by the municipal corporation (see Hardayal v City of New York, 281 AD 2d 593 [2nd Dept 2001]; Caselli v. City of New York, supra).

In addition, a notice of claim involving the TA must be served upon the TA (see Public Authorities Law §1212[4]). The accident report that was prepared by the police officer who responded to the accident was a Department of Motor Vehicles MV-104AN Police Accident Report (NYC) form. Pursuant to §603 of the Vehicle and Traffic Law, the police must file the accident report with the Commissioner of Motor Vehicles. Pursuant to the Police Accident

Report Manual published by the New York State Department of Motor Vehicles, the New York City Police Department is to send accident reports to the DMV's Accident Records Bureau in Albany. No evidence has been proffered to show that the report was filed or brought to the attention of the TA.

Therefore, the filing of an accident report with the DMV did not impart knowledge of the claim to the TA so as to enable the it to conduct a proper investigation, unless additional investigations were conducted and/or reports filed that could be viewed as having put the TA on reasonable notice of the facts underlying the claim. The notice of claim requirement would be rendered academic if the mere filing of a routine police accident report with the DMV and not the municipal corporation against which the claim is made were alone sufficient to excuse the claimant from serving a timely notice of claim in all motor vehicle accident cases. Petitioner has failed to proffer any evidence that any other investigation of the accident or that any other reports were filed with the TA so as to apprise it of the facts underlying the claim.

With respect to a claim against the City, a notice of claim must be served upon the Corporation Counsel of the City of New York or the New York City Comptroller (see Knox v. NYC Bureau of Franchises, 48 AD 3d 756 [2nd Dept 2008]). Therefore, a police accident report filed with the DMV would likewise not serve to impart actual notice to the City of the facts underlying a claim being contemplated against it. In any event, since there is no evidence that a notice of claim was ever served upon the City, but that a notice of claim was only served upon the TA, petitioner has failed to demonstrate that the City acquired timely actual knowledge of the facts underlying petitioner's claim. Since the TA is a separate and distinct legal entity from the City, the City does not acquire actual knowledge of the facts underlying a claim by virtue of anything filed with or by a separate legal entity (see Ealey v City of New York, 204 AD 2d 720 [2nd Dept 1994]).

Petitioner's counsel also argues that the municipal respondents acquired actual knowledge of the facts underlying the claim by virtue of the fact that defendant Croft, a TA employee, was the driver of the bus that was involved in the accident. A municipal entity may acquire actual notice where its employees were present and actually involved in the accident (see, e.g. Whitehead v. Centerville Fire Dist., 90 AD 2d 655 [3rd Dept 1982]), but only where there are other factors involved that imparted the requisite knowledge. Such additional necessary informational factors have been held to involve the filing of additional reports with the municipal entity involved, such as an employee incident report, (see, e.g., Hasmath v. Cameb, 5 A.D.3d 438[2d Dept. 2004]; see

also, Matter of Continental Ins. Co. v. City of Rye, 257 A.D.2d 573 [2d Dept. 1999]).

In Whitehead v. Centerville Fire Dist. (supra), for example, the accident involved a vehicle driven by the captain of the fire company. The accident was immediately reported to the Ulster County Fire Control, the fire district's insurance company was notified of the incident within the 90-day time frame, plaintiff's no-fault carrier with whom plaintiff filed a no-fault claim with supporting medical reports was the same carrier as the fire district's and the fire district's attorney had personal knowledge of the accident and resigned because his law partner undertook representation of plaintiff in anticipation of the litigation. The mere stand-alone knowledge of a public employee who was involved in the accident is not imputed to the municipality or municipal entity.

Municipal Law §50-e would be entirely truncated if a late notice of claim were allowed merely, and solely, because an accident involved a municipal vehicle. This Court is unaware of any controlling case that holds that the mere involvement of a municipal vehicle and driver in an accident automatically constitutes actual knowledge by the municipality of the facts underlying the subsequent claim so as to merit allowing a late notice even in the absence of any excuse for the delay. In the present matter, there is no showing or allegation that the TA or the City conducted any investigations or that any reports were filed with them so as to have alerted them to the facts of this matter.

Finally, petitioner has failed to demonstrate or even allege that respondents would not be prejudiced by the delay. It is the burden of the claimant seeking leave to serve a late notice of claim to show lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008). In any event, this Court may not reach the issue of prejudice, even had petitioner alleged lack of prejudice, since petitioner has failed to demonstrate either that there was a reasonable excuse for its failure to timely file a notice of claim or that the municipal respondents acquired actual knowledge of the facts constituting the claim within the statutory 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]). Nevertheless, it is the opinion of this Court that the delay until March 27, 2013 in commencing the instant proceeding for leave to file a late notice of claim has prejudiced respondents' ability to investigate the incident effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]).

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for leave to serve a late notice of claim without an adequate excuse by counsel for the delay, and absent the receipt by respondents of timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Accordingly, the application is denied and the petition is dismissed. Petitioner may enter judgment accordingly.

Dated: May 21, 2013

KEVIN J. KERRIGAN, J.S.C.