

Rosario-Bencosme v City of New York

2013 NY Slip Op 32821(U)

November 1, 2013

Supreme Court, New York County

Docket Number: 157140/13

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: FREED HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5
Justice

ROSARIO-BENCOSHE, CARMEN

INDEX NO. 157140/13

- v -
CITY OF NEW YORK,
ET AL.

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**

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

Dated: 11-1-13
NOV 01 2013


HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
CARMEN ROSARIO-BENCOSME,

Plaintiff,

DECISION/ORDER
Index No. 157140/2013
Seq. No. 001

-against-

CITY OF NEW YORK and NEW YORK CITY
HOUSING AUTHORITY,

Defendants.

-----X
KATHRYN E. FREED, JSC:

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.....5.....
EXHIBITS.....
OTHER.....(NYCHA’s memo of law).....4.....

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

Plaintiff moves for an Order pursuant to General Municipal Law§ 50-e, declaring nunc pro tunc that her Notice of Claim be deemed timely served upon defendant New York City Housing Authority (“NYCHA”). NYCHA opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the order to show cause.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on May 12, 2012, when she tripped and fell on a defective sidewalk in front of the premises located at 461 West

164th Street in New York County. Said premises is owned and/or operated by NYCHA. Consequently, she served a Notice of Claim on the City on June 11, 2012. Plaintiff asserts that she is in possession of a deed identifying the City as the owner of the aforementioned premises. She also asserts that on June 15, 2012, April 1, 2013 and June 17, 2013, the Comptroller of the City of New York sent letters requesting documents for a possible disposition of the instant claim. However, she asserts that the Comptroller never issued a "Third Party Notice" Letter advising that the subject premises was owned by any other person or entity who may be liable under New York Administrative Code §7-210, a practice that is always done.

Plaintiff asserts that despite the existence of the deed and the absence of the "Third Party Notice" letters, she just became aware that NYCHA may be the owner of the subject premises. Additionally, pursuant to Administrative Code §7-120, in the capacity as owner, NYCHA may be liable for the condition of the sidewalk adjacent to the premises wherein the accident allegedly occurred. As a result, on July 12, 2013, plaintiff served a Notice of Claim on NYCHA, within the one year and ninety day statutory requirement. Plaintiff also asserts that NYCHA and the City have entered into a "Cooperation Agreement" and/or "Indemnification Agreement" regarding the subject premises. She asserts that [a]s a result, the duty to maintain and the liability for certain sidewalks are contracted away from the New York City Housing Authority to the City. Also, as a result, the City may indemnify NYCHA for any loss."

Positions of the parties:

Plaintiff argues that since NYCHA and the City maintain an agency relationship, timely notice to the City is also imputed to NYCHA and the absence of a "Third Party Notice" Letter further evidences this relationship. Thus, plaintiff seeks to have the Court impute notice of the contents of

plaintiff's Notice of Claim which was timely served on the City, to NYCHA. Thus, NYCHA would suffer no prejudice from the granting of her OSC.

NYCHA argues that plaintiff's application necessitates denial because she fails to satisfy the requirements promulgated by GML§50-e for leave to serve a late Notice of Claim—an adequate excuse for the delay, proof that NYCHA had actual notice of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter, and a lack of prejudice caused by the delay. NYCHA argues that plaintiff's argument that information contained in a timely Notice of Claim to the City can also be imputed to it lacks merit in that it is a well settled legal principle that NYCHA and the City are distinct and separate legal entities. Therefore, notice to one can never be imputed to the other.

NYCHA also argues that despite plaintiff's attorney's claim that he "just learned that defendant NYCHA may be the owner of subject premises," (see Shore Aff., ¶ 9), he fails to state when he became aware of this fact, fails to describe the circumstances which alerted him to NYCHA's ownership and fails to explain why it took almost one year and ninety days to ascertain that NYCHA owned the adjacent property. NYCHA asserts that counsel's failure to serve it with a timely Notice of Claim emanates from inexcusable law office failure because an examination of the NYC Department of Finance Office of The City Register's ("ACRIS") website would have revealed that 461 West 164th Street is located at Block 111, Lot 40, a fact counsel concedes he was able to determine. NYCHA argues that ACRIS clearly shows that NYCHA owns the building at 461 West 164th Street and was the owner on the date of plaintiff's accident. Thus, had counsel reviewed the latest recorded ACRIS documents, he would have ascertained this fact.

Conclusions of law:

A court in its discretion may extend the time under GML§ 50-5 to serve a Notice of Claim. In exercising its discretion, the court must consider whether the movant has demonstrated a reasonable excuse for its failure to file a timely Notice of Claim; whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days from its accrual or a reasonable time thereafter; and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (see *Bazile v. City of New York*, 94 A.D.3d 929-930 [2d Dept. 2012]; *Matter of Henriques v. City of New York*, 22 A.D.3d 847, 848 [2d Dept. 2005]; *Plaza v. New York Health & Hosps. Corp., [Jacobi Med. Ctr.]*, 97 A.D.3d 466 [1st Dept. 2012], *aff'd* 21 N.Y.3d 983 [2013]; *Seif v. City of New York*, 218 A.D. 595 [1st Dept. 1995]).

The presence of absence of any one factor is not determinative, and the absence of a reasonable excuse for the delay is not necessarily fatal (see *Chattergoon v. New York City Housing Auth.*, 197 A.D.2d 397 [1st Dept. 1993]; *Nardi v. County of Nassau*, 18 A.D.3d 520 [2d Dept. 2005]; *Velazquez v. City of N.Y. Health & Hosp. Corp. [Jacobi Med. Ctr.]*, 69 A.D.3d 442 [1st Dept. 2010], *lv denied* 15 N.Y.3d 711 [2010]; *Schiffman v. City of New York*, 19 A.D.3d 206 [1st Dept. 2005]).

Where a Notice of Claim has not been served within the statutorily mandated 90 day period specified in GML§5–e(1), an individual possessing a particular tort claim against a public corporation may also apply to the court pursuant to GML§ 50-e(5), for an extension of time upon which to serve notice upon the defendant, and said application for the extension may be made before or after the commencement of the action but not more than on year and 90 days after the cause of action accrued (*Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 258 [1982]; *Pierson v. City of New York*, 56 N.Y.2d 951, 954 [1982]).

In the case at bar, the Court finds that plaintiff served a Notice of Claim on NYCHA within the one year ninety days period since her accident. Indeed, even the City concedes that “[a]lmost one year and ninety days after plaintiff was injured when she tripped and fell on a public sidewalk, she seeks leave to serve a late notice of claim on NYCHA....” (Bass Aff., p.1, ¶ 2).

The Court also finds that NYCHA will suffer no prejudice by its granting of the instant O.S.C.. Indeed, whatever information and exhibits were testified to and marked into evidence by the City at the GML§ 50-h hearing, including photographs of the subject sidewalk which existed at or near the time of the accident, will prevent NYCHA from being prejudiced. Moreover, the Court notes that although beyond the 90 day period, this application is being made within the one year and ninety day statutory period during which courts are afforded broad discretion in deciding whether or not, to grant the filing of a late Notice of Claim.

Therefore, in accordance with the foregoing, it is hereby


ORDERED that plaintiff’s Order To Show Cause declaring that her Notice of Claim be deemed timely served upon defendant New York City Housing Authority nunc pro tunc is granted’ and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 12, 2013 at 80 Centre Street, Room 301 at 2:00 p.m.; and it is further

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

DATED: November 1, 2013

ENTER:


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

NOV 01 2013