

Matter of Thill v North Shore Cent. Sch. Dist.

2013 NY Slip Op 34079(U)

November 19, 2013

Supreme Court, Nassau County

Docket Number: 601973/13

Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

In the Matter of

BARBARA SPERBER THILL and RICHARD S.
THILL,

Petitioners,

-against-

NORTH SHORE CENTRAL SCHOOL DISTRICT,

Respondents.

_____ x

Index No. 601973/13

Motion Submitted: 11/6/13

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Petitioners seek leave to file a late Notice of Claim against respondent school district. Respondent opposes the requested relief.

This action arises from an incident that occurred on March 1, 2013, at approximately 9:52 a.m. A motor vehicle driven by Cruz Correa impacted the petitioners' vehicle head-on, on Glen Cove Avenue, in Nassau County, New York. Petitioners were injured. Correa was charged with Reckless Driving, in violation of Vehicle and Traffic Law § 1212, and he was ultimately prosecuted for his actions. Apparently, Correa operated his motor vehicle without insurance on the day of the incident.

Petitioners seek redress from respondent school district upon a theory that one of its employees, a teacher named Mr. Whalley, was negligently crossing Glen Cove Avenue on foot, which allegedly set in motion the chain of events leading to Correa's collision with petitioners. The teacher, a pedestrian, was also struck by the vehicle operated by Correa, and he sustained injuries as well.

The instant order to show cause was issued by the Court on July 31, 2013, and it was served upon respondent on August 1, 2013.

The proposed Notice of Claim annexed to the instant petition as Exhibit A asserts that the pedestrian teacher was engaged in the scope of his employment with respondent at the time of the incident, and that he was negligent in crossing the street by "failing to obey and observe traffic-control signals; in failing to yield the right of way to a motor vehicle; in failing to keep a proper lookout; failing to observe and obey the provisions of the Vehicle and Traffic Law of the State of New York; failing to exercise due care; and in failing to avoid a collision with the motor vehicle owned and operated by Cruz Correa which subsequently struck the [petitioners' vehicle]."

In the verified petition, the petitioners aver that, on July 18, 2013, they were told by a Nassau County Assistant District Attorney that video images captured by a nearby gas station camera revealed that the teacher was crossing Glen Cove Avenue "against the traffic light at the time of the accident."

General Municipal Law § 50-e provides for the filing of a Notice of Claim with the public corporation who may be liable for the happening of an incident.

The time for service of the Notice of Claim in this case is within ninety (90) days after the claim arose (*Gen. Mun. Law § 50-e [1][a]*), and the statute of limitations period is one year and ninety (90) days from accrual of the claim (*Gen. Mun. Law § 50-i [1]*). Petitioners in this case should have filed their Notice of claim on or before May 30, 2013.

The trial court has broad discretion whether to grant leave to file a late notice of claim. In making its determination, the Court should consider 1) whether the public corporation has acquired actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim has arisen, or within a reasonable time thereafter; 2) whether the delay in serving the notice of claim would substantially prejudice the public corporation in maintaining its defense on the merits; 3) whether the claimant is an infant or physically or mentally incapacitated, and 4) whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim (*Corvera v Nassau County Health Care*

Corporation, et al., 38 AD3d 775 [2d Dept 2007]; see also *Keyes v City of New York*, 89 AD3d 1086 [2d Dept 2011]).

Petitioners maintain that respondent had actual notice of the facts underlying petitioners' claim because respondent's employee engaged in the conduct that gave rise to the incident, and "accident reports were presumably prepared." This Court disagrees.

Counsel for both parties to this proceeding have submitted the police accident report for this incident. Although none of the copies submitted by either counsel is certified, the authenticity of the police accident report is undisputed by the parties, and they each rely on the report; therefore, the Court will consider the police accident report in the determination of this motion.¹

The police accident report, which is the only report submitted by petitioners, along with its code sheet/key, clearly indicates that the teacher was crossing with the signal. The teacher was not issued any tickets or summonses. The only individual issued a ticket/summons, and an arrest number, was Cruz Correa, the driver of the car that hit petitioners head-on. As noted, Correa was charged with Reckless Driving. Contributing factors to the accident, which are listed on the accident report as "failure to yield right of way" and "unsafe speed," are attributed only to Correa. The teacher who was hit by Correa was not cited as having committed any acts in contravention of the Vehicle and Traffic Law, nor are petitioners cited as having contributed to the collision.

Keeping in mind that it is well-settled that mere notice of the occurrence is not sufficient notice of a particular claim (*Morehead v Westchester County*, 222 AD2d 507 [2d Dept 1995]), it is not reasonable in this case to conclude that respondent would have been "able to readily infer from that report that a potentially actionable wrong had been committed by the [employee of] the public corporation" (*Thompson v City of New York*, 95 AD3d 1024, 1025 [2d Dept 2012]; see also *Farfan v City of New York*, 101 AD3d 714 [2d Dept 2012]; *Taylor v County of Suffolk*, 90 AD3d 769 [2d Dept 2011]).

Moreover, petitioners' statement that a particular Assistant District Attorney told them that the "video images captured by a nearby gas station [surveillance camera] and interviews with [the teacher] revealed that the teacher was crossing Glen Cove Avenue against the traffic light at the time of the accident" are utterly unsubstantiated hearsay (*Keyes, supra*).

Petitioners' claim that Barbara Sperber Thill was "seriously injured and physically

¹The Court notes that petitioners failed to include the code sheet/key with their submitted copy of the police accident report. Respondent included the code sheet/key.

incapacitated for over 90 days” is unsupported by any medical evidence to establish that she was incapacitated to such an extent that she could not have complied with the statutory requirement (*Bell v City of New York*, 100 AD3d 990 [2d Dept 2012]; *Taylor, supra*). According to the verified petition, Barbara Sperber Thill was released from the hospital on March 14, 2013, and was discharged to her home. She had no further hospitalizations until May 12, 2013, and she was released three days later. The petition does not aver that petitioner Richard S. Thill was in any way incapacitated, other than to state that “he has been occupied by caring for [Barbara Sperber Thill’s] daily needs” Thus, both petitioners have failed to establish that they were so physically or mentally incapacitated as to excuse their failure to timely file the Notice of Claim.

According to their own statements made in the petition, the petitioners decided to consult with counsel only after the Assistant District Attorney allegedly stated that the teacher who was struck by Correa was crossing “against the traffic light.” Petitioners offer as an excuse for their failure to timely file a Notice of Claim that they were not advised of the alleged wrongdoing of the teacher until July 18, 2013, thus only recently realizing that they may have a claim against respondent. Such an excuse is not acceptable (*Abramovitz v City of New York*, 99 AD3d 1000 [2d Dept 2012]; *Thompson, supra*).

Furthermore, not only is the alleged statement made by the Assistant District Attorney utterly unsubstantiated, but it is controverted by the police accident report, upon which petitioners heavily rely for this application. Thus, it does not constitute a reasonable excuse for failing to timely serve a Notice of Claim.

Given the fact that respondent had no inkling that its employee, the teacher who was also struck by Correa’s car, was alleged to have been crossing against the light or acting in a negligent manner prior to the filing of the instant application, respondent never investigated the matter at or about the time of its occurrence, which was five months prior to the filing of this petition, and two months after the expiration of the 90-day period for filing the Notice of Claim.

According to the affidavit of Dr. Marc Ferris, respondent’s employee and principal of North Shore Middle School, he was never informed by police that the video surveillance camera captured the teacher crossing against the light, or otherwise acting in a negligent manner. Having never been timely advised that there was any intention to assert a claim against respondent, not only was there no investigation conducted by respondent, but respondent did not notify its liability insurance carrier about the incident until receipt of this petition. Consequently, respondent would be substantially prejudiced if it must defend this claim at this juncture, according to Dr. Ferris. This Court agrees.

Finally, “[w]hile the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, where the proposed claim is patently without merit, leave to serve a late notice of claim should be denied” (*Gaeta v Incorporated Village of Garden City*, 72 AD3d 683, 684 [2d Dept 2010]; see also *Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]).

The sum total of the allegation against the teacher is that he crossed against the traffic light, as stated in the petition; yet, there is no evidence that he did so. In fact, the evidence is to the contrary.

In an attempt to remedy their defective application, petitioners have submitted in reply two digital video discs (DVDs) from the surveillance camera at the gas station referred to above. Counsel does not state when he received such DVDs, and he does not state from whom he obtained them. According to his reply affirmation, counsel states that the information request (FOIL) from the Nassau County Police Department was still “being processed” at the time his reply papers were dated: November 5, 2013; thus, the source of the DVDs is unknown. In any event, since the DVDs are submitted for the first time in reply, they will not be considered by the Court (*Bell, supra; Keyes, supra*).

Even if the Court were to consider the DVDs, they do not advance the instant petition. Exhibit B contains the DVD that depicts the head-on collision between Correa and petitioners. While it is disturbing to watch, counsel concedes that it “does not show the crosswalk where Mr. Whalley was crossing”

Exhibit C in reply contains the DVD depicting mostly the gas station property, and “part of the crosswalk where it meets the northwest corner of the intersection of Glen Cove Avenue and the entrance/exit to North Shore Middle School, which is where Mr. Whalley started crossing from.” The extreme top left of the video shows the corner, and part of the two lanes of traffic heading in opposite directions. The video does not show any traffic signal devices of any kind.

Exhibit C is equally disturbing in that it shows the bottom half of a pedestrian being struck by a car, and crumpling to the ground. Presumably, the pedestrian is Mr. Whalley, and the car that is pictured striking him down was operated by Correa.

Counsel tacitly admits that the videos are insufficient to demonstrate that which the petitioners claim. Counsel states that, “[i]n the event that Mr. Whalley was crossing while the light facing School Street was red, he *would be* in violation of sections 1111 and 1150 of the Vehicle and Traffic Law. Crossing in disobedience of a Walk/Don’t Walk sign violates section 1112 of the Vehicle and Traffic Law” (Reply Affidavit, p. 7 emphasis added).

Moreover, “[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary” (*Vehicle and Traffic Law § 1146 [a]*; see also *Barbieri v Vokoun*, 72 AD3d 853 [2d Dept 2010]; *Beamud v Gray*, 45 AD3d 257 [1st Dept 2007][pedestrian crossing street at crosswalk, with light in her favor, entitled to summary judgment]).

Accordingly, the Court declines to grant petitioners leave to file a late Notice of Claim, and the petition is dismissed.

The foregoing constitutes the Order of this Court.

Dated: November 19, 2013
Mineola, N.Y.

Karen V. Murphy

J. S. C.
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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE