Matter of Leighton v City of New York
2014 NY Slip Op 30728(U)
March 20, 2014
Sup Ct, New York County
Docket Number: 156468/2013
Judge: Kathryn E. Freed

[* 1]

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

In the Matter of the Claim of

PATRICIA LEIGHTON and DEL GEIST,
Petitioners,

-against-

THE CITY OF NEW YORK,
Respondent.

For an Order to file a late Notice of Claim, pursuant to Subdivision 1 of said Section 50 (e) of the General Municipal Law of the State of New York.

DECISION/ORDER

Index No. 156468/2013
Motion Sequence 001

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(Ex A-B).
AFFIRMATIONS IN OPPOSITION.....	...3.....
REPLYING AFFIRMATION.....	...4.....
OTHER.....	.....

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

Petitioners Patricia Leighton (Leighton) and Del Geist (Geist) petition this court, by order to show cause, for leave to serve a late notice of claim. After hearing oral argument of the application, and based on a review of the motion papers and relevant statutes and case law, this Court **denies** the motion.

Factual Background

Leighton was allegedly injured on December 20, 2012, when she tripped and fell on the sidewalk in front of the Hampton Inn, a hotel located at 337 West 39th Street, New York County. On June 13, 2013, she retained counsel, who contacted the hotel's owner, evoking a response, on June 27, 2013, from a claims representative for the hotel's insurer. The claims representative stated that the cap embedded in the sidewalk, which allegedly caused Leighton to trip, was possibly owned, maintained and/or repaired by the City of New York ("the City").

Petitioners then filed a notice of claim with the City on July 2, 2013. Petition, Exhibit A. The notice of claim was rejected as late by the City on or about July 17, 2013.[1] Petitioners state that three prior versions of the instant petition were deemed unacceptable by the court, "due to clerical errors," until this order to show cause was signed on October 30, 2013. Lasher Affirmation, at ¶ 10.

Geist is Leighton's spouse, who will, if allowed, pursue a derivative claim.

Discussion

General Municipal Law (GML) § 50-e (1) (a)[2] requires service of a notice of claim on the City in a tort action within 90 days after the claim arises. However, the statute allows the court, in its discretion, to extend the time to serve a notice of claim upon consideration of whether the

[1] Except for a copy of the notice of claim and some photographs of the site at issue, no other documents or materials are submitted by petitioners or the City.

[2] The petition's caption incorrectly identifies the statute as Section 50 (e) of the General Municipal Law.

City "acquired actual knowledge of the essential facts constituting the claim" within 90 days or a reasonable time after the event, "all other relevant facts and circumstances," and "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits." GML § 50-e (5). If permission to serve a late notice of claim is granted, it must still be served within the applicable statute of limitations of one year and 90 days. GML § 50-i (1).

"[T]he lack of a reasonable excuse [for delay] is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim." *Matter of Ansong v City of New York*, 308 AD2d 333, 334 (1st Dept 2003). Here, after an unexplained, or at best a poorly-explained, delay of six months, petitioners hired counsel and soon learned of the need to proceed against the City. Then, within one week, petitioners served a notice of claim, a total of six months and two weeks after the incident, and more than three months beyond the limit of GML § 50-e (1) (a). These circumstances might not ordinarily disqualify petitioners' application. In *Matter of Ansong*, for instance, petitioner's motion for leave to file a late notice of claim about 54 weeks after the incident was granted. Yet, in *Harris v City of New York* (297 AD2d 473 [1st Dept 2002]), the Appellate Division affirmed the denial of leave to file a late notice of claim only four weeks after the 90-day deadline because plaintiffs "failed to meet their burden with respect to two other factors – some prior actual notice and the absence of prejudice . . ." *Id.* at 474.

In the instant proceeding, as in *Harris*, petitioners have not provided evidence that the City acquired actual knowledge of the essential facts surrounding the incident. Petitioners contend that "per the claims representative's statement, and all the attached photographs, the defective condition of the sidewalk cap was caused, created and/or maintained by [the City], so

[the City] had actual notice of the condition then and there existing." Lasher Affirmation, at ¶ 7. Of course, the word of the claims representative is valueless unless he was personally a witness to the incident or, at least, to the City's creation or knowledge of the hazard. The broadly-paraphrased information about the City's possible ownership of the sidewalk cap, allegedly received by petitioners' counsel on June 27, 2013, simply does not meet the standard of GML § 50-e (5) for actual knowledge by the City of the essential facts constituting the claim.

The photographs do little more to advance petitioners' position. None of the photographs are dated. Four are attached to the proposed notice of claim, and are identified only as "taken soon after the accident." *Id.* Three more photographs (Petition, Exhibit B) are said to have been "taken recently . . . [where] one can see that [the City] has already repaired the defective condition." *Id.* The repairs themselves did not provide the City with actual knowledge of the claim and, in fact, may have made it virtually impossible for the City to investigate the claim if performed before the City received the late notice of claim on or about July 2, 2013. *See Barnes v New York City Hous. Auth.*, 262 AD2d 46 (1st Dept 1999) (the defendant was not prejudiced when site repairs were made two months after service of a late notice of claim).

Petitioners offer no other evidence concerning the City's possible awareness of the incident, such as treatment at the scene by publicly-employed personnel. *Matter of Allende v City of New York*, 69 AD3d 931, 932-933 (2d Dept 2010) (Department of Education on notice of facts constituting claim because, "immediately after the incident, the school nurse treated the infant petitioner's injury and sent him to the hospital, and the assistant principal prepared an occurrence/comprehensive injury report on the day of the incident and updated that report five days after the incident"); *Matter of Dewey v Town of Colonie*, 54 AD3d 1142, 1143 (3d Dept

2008) ("respondents had actual notice of the essential facts underlying the claim given that, among other things, respondent Town of Colonie Police Department and the Colonie Emergency Medical Services were present at the scene and assisted Dewey after he fell").

Here, petitioners make an unsupported allegation in the proposed notice of claim that

> "upon information and belief, actual notice was filed with the Department of Transportation and/or THE CITY OF NEW YORK more than fifteen (15) days prior to December 20, 2012, and said parties failed and/or neglected to make timely repairs to correct said condition and/or said Respondents caused and created the dangerous condition."

Considering the relevant facts and circumstances, the petition for leave to serve a late notice of claim is denied. Petitioners have failed to meet their burden with respect to prior actual notice and the absence of prejudice. Also, the City was prejudiced by the delay between the 90-day deadline for serving a notice of claim and the service of the proposed late notice of claim since the physical condition of the site changed significantly, thereby hampering the City's ability to investigate the incident. *Matter of Iacone v Town of Hempstead*, 82 AD3d 888, 889 (2d Dept 2011) (petition for leave to serve a late notice of claim denied, because "[t]he petitioners' delay prevented the appellant from conducting a timely investigation into whether the alleged dangerous condition was a cause of the accident and from interviewing potential witnesses while their recollections were fresh"). The Court additionally notes that it is impossible to accurately tell, especially from the undated photos presented by the plaintiff, just how deep the manhole cover was before it was repaired or re-seated. This fact would be material in evaluating the potential liability of the City, since any such liability could be affected by the depth of the cover. Thus, the City was severely prejudiced by not being apprised of this claim in a timely fashion such that it could have measured the depth of the manhole prior to the significant change of the

depth thereof. This Court further notes that no real proof has been offered as to the real owner or entity actually responsible for the maintenance of the manhole cover. Rather, petitioners merely speculate that the City was actually responsible for the manhole.

Therefore, in accordance with the foregoing, it is hereby:

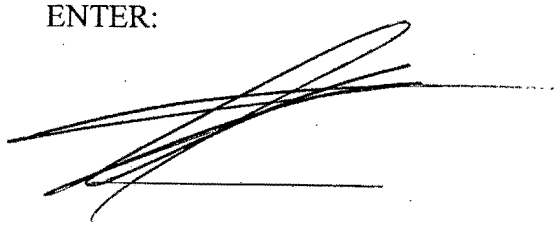
ORDERED that the petition is denied, and the proceeding is dismissed; and it is further,

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

DATED: March 20, 2014

MAR 20 2014

ENTER:



Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT