

Morris v County of Tioga
2014 NY Slip Op 31173(U)
May 5, 2014
Supreme Court, Tioga County
Docket Number: 44265
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 25st day of April, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

BERNADINE HAAG MORRIS, as
Administratrix for the Estate of
Frederick C. Haag,

Petitioner,

DECISION AND ORDER

Index No.: 44265
RJI No.:

-vs-

THE COUNTY OF TIOGA,

Respondent. .

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

Petitioner, Bernadine Haag Morris, Administratrix for the estate of Frederick C. Haag¹ (“Petitioner”), seeks leave for the late filing of a notice of claim against The County of Tioga (“Respondent”) pursuant to General Municipal Law §50-e (5). The Plaintiff seeks to raise claims against Respondent for negligence and wrongful death.

The Court received and considered the following documents in this matter:

Petitioner’s Notice of Petition and Petition for Leave to File late Notice of Claim (with exhibits) dated October 22, 2013;
 Petitioner’s Affirmation In Support of Petition (with exhibits) dated October 22, 2013;
 Respondent’s Verified Answer and Objections In Point Of Law dated April 16, 2014;
 Respondent’s Attorney Affidavit dated April 16, 2014;
 Respondent’s Affidavit of Gary W. Howard (with exhibits) dated April 11, 2014;
 Respondent’s Memorandum of Law dated April 16, 2014.

For the reasons set forth herein, the Petitioner’s motion is denied.

The above action arises from the suicide death of Frederick C. Haag (“Decedent”) while in the custody of the Tioga County Sheriff’s Department. The Decedent was incarcerated in the Tioga County Jail from July of 2011 until his death on October 24, 2011. During his incarceration, Decedent’s medical care was allegedly provided by Correctional Medical Care, Inc. (“CMC”); a medical services company contracted by Tioga County for the provision of medical services in the jail. Following the Decedent’s death, the Tioga County Sheriff’s Department conducted an investigation and also cooperated with an investigation performed by the New York State Commission of Correction.

The Petitioner filed the instant application on October 23, 2013. Petitioner seeks leave to file late notice of actions sounding in negligence and wrongful death. In this regard, this application was filed one day shy of 2 years after the decedent’s death. Timely service on the Respondent was initially contested but at oral argument, Respondent conceded timely and proper service.

Under applicable law, “[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the

¹Bernadine Morris was appointed as Administratrix of the Decedent’s estate pursuant to Letters of Administration issued by the Broome County Surrogates Court on February 28, 2012.

ninety days shall run from the appointment of a representative of the decedent's estate". NY Gen. Mun. §50-e(1)(a). The statute further provides that "[u]pon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section..." NY Gen. Mun. §50-e(5). Any such "...extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation." NY Gen. Mun. § 50-e(5).

"[T]he decision to permit the late filing of a notice of claim is discretionary and involves an inquiry as to whether [the] respondents acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, whether a reasonable excuse was proffered for the delay in filing a claim and whether granting a late filing would prejudice [the] respondents". *Matter of Reinemann v Village of Altamont*, 112 AD3d 1264, 1265 (3rd Dept. 2013); quoting *Matter of Crocco v Town of New Scotland*, 307 AD2d 516, 517 (3rd Dept. 2003); *Matter of Euson v County of Tioga, N.Y.*, 94 AD3d 1279, 1280 (3rd Dept. 2012); *Matter of Schwindt v County of Essex*, 60 AD3d 1248, 1249 (3rd Dept. 2009). No single factor is determinative. *Reinemann, supra*; see *Matter of Hayes v Delaware-Chenango-Madison-Otsego Bd. of Coop. Educ. Servs.*, 79 AD3d 1405, 1405 (3rd Dept. 2010); *Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1314-1315, (3rd Dept. 2010).

To satisfy the actual knowledge prong, petitioners are required to establish that respondents possessed more than a generalized awareness that some sort of injury had occurred. *Matter of Conger v Ogdensburg City School Dist.*, 87 AD3d 1253, 1255 (3rd Dept. 2011); *Matter of Formisano v Eastchester Union Free School Dist.*, 59 AD3d 543, 544 (3rd Dept. 2009); *Matter of Johnston v Town of Putnam Val. Police Dept.*, 167 AD2d 612, 614 (3rd Dept. 1990).

In the present case, there is little doubt the Respondent had some knowledge of the facts giving rise to the decedent's suicide. Decedent committed suicide while in the custody of the Tioga County Sheriff's Department. In his affidavit, Tioga County Sheriff Gary Howard acknowledges that following the Decedent's death, an investigation was conducted and inmates were interviewed. (Howard affidavit at p.1-2). However, the record is bereft of information pertaining to the nature and extent of that investigation. Although Howard admits that an investigation was undertaken, the focus of that investigation is unclear.² Sheriff Howard's affidavit states that the investigation did not delve into matters concerning a possible wrongful death or negligence claim, and that he was unaware of any such allegation, until this action was commenced.

The report of the Commission of Correction does not constitute knowledge of the facts of the claim within 90 days as it was issued December 18, 2012, some thirteen months after the

²For example, the investigation could have been to ensure that it was indeed a suicide rather than a homicide.

Decedent's death. It was also almost 10 months after the Administratrix was appointed. There is no evidence in the record regarding when the investigation was conducted and what information was shared with Tioga County.

Howard also alleges that no investigation was made with regard to the nature and quality of the services provided by CMC. There is no support in the record for the proposition that Tioga County had sufficient facts constituting the claim within 90 days of the Decedent's death (or even the appointment of the Administratrix) regarding the actions or inactions of CMC.

While it is clear that the Respondent was aware of the death, and had conducted some investigation, the Petitioner has failed to demonstrate that respondent "had actual knowledge of the essential facts constituting the claim." *Reinemann, supra* 1266, quoting *Kirtley v Albany County Airport Auth.*, 67 AD3d 1317, 1318-1319, 889 N.Y.S.2d 128 [2009] [internal quotation marks and citation omitted]; see *Folmar v Lewiston-Porter Cent. School Dist.*, 85 AD3d 1644, 1645, 925 N.Y.S.2d 730 [2011]; *Matter of Petersen v Susquehanna Val. Cent. School Dist.*, 57 AD3d 1332, 1334, 870 N.Y.S.2d 155 [2008]; compare *Matter of Franco v Town of Cairo*, 87 AD3d 799, 800-801, 928 N.Y.S.2d 396 [2011]; *Matter of Schwindt v County of Essex*, 60 AD3d at 1249-1250).

In *Reinemann*, the Respondent fire department had responded to a furnace malfunction, and allegedly was responsible for manipulating a valve, which ultimately resulted in a fuel oil leak, that was initially undetected. After the leak was discovered and fixed, the Department of Environmental Conservation was advised, and then they notified the fire department. Two months later, the petitioner sought to file a late notice of claim. The application was denied. The court noted that the fire department was not aware that petitioners were claiming that the fire department was at fault, until the application was filed. Therefore, the respondent had not obtained the actual knowledge of the essential facts constituting the claim, even though it was their alleged negligent act that caused the damage.

Similarly, in *Kirtley*, leave to file late notice was denied in a slip and fall case. The Petitioner had filed an incident report with the Respondent shortly after it occurred, but there were no facts to suggest the Respondent was responsible for the dangerous condition, or were responsible through the acts of a contractor. Therefore, actual knowledge of the essential facts constituting the claim was not shown. See also *Folmar, supra* ("[T]he proposed notice of claim alleges that respondent is vicariously liable for the actions of the teacher who drove his vehicle into the path of the bus. The record support's respondent's contention that it was not aware of those allegations until claimant made the instant application, and thus was unaware of any facts to suggest that it was responsible for claimant's injuries despite its knowledge that the accident occurred.") *Id.* at 732 (citation omitted); *Kliment v. City of Syracuse*, 294 AD2d 944 (4th Dept. 2002) (police report of accident involving car and pedestrian did not make any connection

between the accident and any negligence on the part of the City; therefore, notice of essential facts not established). A “public corporation’s knowledge of the accident and the injury, without more, does not constitute ‘actual knowledge of the essential facts constituting the claim’ (General Municipal Law § 50-e [5]; see *Weber v County of Suffolk*, 208 AD2d 527, 528, 616 NYS2d 807 [1994]), at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable. *Matter of Felice v. Eastport/South Cent. School Dist.*, 50 AD3d 138 (2nd Dept 2008).

In the present matter, the evidence does not establish that the Respondents had actual knowledge of the essential facts constituting the claim. Instead, the Court is persuaded that the County was not aware of the factual allegations concerning the claims being alleged here, until the report from the Commission of Corrections. That was almost 14 months later.

The Petitioner alleges “reasonable excuse” based upon the reluctance of the Administratrix to pursue a claim against Tioga County. Ultimately, this reluctance resulted in delay and the failure of the Petitioner to timely file a notice of claim and the resultant need for the instant application. However, such delays do not constitute reasonable excuse. See generally *Bowman v. Campbell*, 193 AD2d 921 (3rd Dept. 1993)(delay alleged to be due to the difficulty in ascertaining who could properly be appointed to administer the estate, and several attempts to have a representative appointed). Waiting to retain counsel is also not a reasonable excuse. *Matter of Williams v. City of New York*, 2008 NY Misc LEXIS 9366 (Supreme Court New York County, 2008); see also *Morgan v. Elmira*, 115 AD2d 885 (3d Dept 1985); *Weber v. County of Suffolk*, 208 AD2d 527 (2nd Dept 1994). Ignorance of the notice requirement is also insufficient. *Narcisse v Village of Central Islip*, 36 AD3d 920 (3rd Dept. 2007). In this matter, the Court is unpersuaded that the reluctance of the Administratrix is a reasonable excuse. This is not a matter of not knowing that notice must be given, but rather the Petitioner’s indecision giving rise to the delay. This proffered explanation is not a “reasonable excuse.”

However, it is well settled that “petitioner’s failure to allege a reasonable excuse for the delay is not necessarily fatal to h[er] application” *Matter of Jensen v City of Saratoga Springs*, 203 AD2d 863 (3rd Dept. 1994); see, e.g., *Matter of Krohn v Berne-Knox-Westerloo Cent. School Dist.*, 168 AD2d 826, 826-827 (3rd Dept. 1990) because “no one factor is dispositive of the issue” *Matter of Esposito v Carmel Cent. School Dist.*, 187 AD2d 854, 855 (3rd Dept. 1992).

The Petitioner must also show that the delay did not substantially prejudice the municipality in maintaining its defense on the merits. *Welch v Saratoga Cent. School Dist.*, 287 AD2d 761 (3rd Dept. 2001). However, due to the paucity of evidence regarding the extent of the Sheriff Department’s investigation, it cannot be said with any certainty that Tioga County has not been prejudiced by the nearly 24 month delay between the accrual of the action and the instant application. With regard to any claims against Tioga County which arise from some vicarious

liability regarding the actions or inactions of CMC, there is evidence of prejudice as evidenced in Howard's affidavit.

The Court is persuaded that the Petitioner has failed to show that the Respondent had knowledge of facts constituting the claim and has failed to provide reasonable excuse for the failure to timely file her notice of claim. The Court also finds that the Respondent has been prejudiced by the Petitioner's delay.

For the reasons set forth herein, the Petitioner's application for leave to file a late notice of claim is denied.

ENTER

May 5, 2014

S/EUGENE D. FAUGHNAN
SUPREME COURT JUSTICE