

Archer v Port Auth. of N.Y. & N.J.

2014 NY Slip Op 31H J(U)

April 25, 2014

Supreme Court, Queens County

Docket Number: 703505/13

Judge: Augustus C. Agate

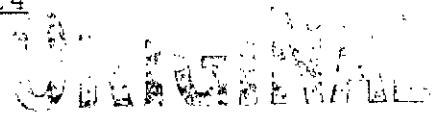
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice



-----x

JERROLD V. ARCHER and ELIZABETH ARCHER,

Index No: 703505/13

Plaintiffs,

Motion

Dated: September 27, 2013

-against-

m# 1

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

-----x

The following papers numbered EF 3 - 41 read on this motion by plaintiff for an order deeming the August 5, 2013 Notice of Claim timely, or, in the alternative, for leave to serve a late notice of claim upon defendant nunc pro tunc; and cross motion by defendant for an order dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits	EF 3 - 29
Notice of Cross Motion - Affidavits	EF 30 - 35
Replying Affirmations.....	EF 37 - 41
Defendant's Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by plaintiffs and cross motion by defendant are decided as follows:

Plaintiff Jerrold V. Archer allegedly sustained serious injuries when he fell in Terminal C at LaGuardia Airport on August 23, 2012. At the time of the incident, plaintiff and his wife were on their way home to South Carolina. Defendant Port Authority of New York and New Jersey ("Port Authority") owns and operates LaGuardia Airport. On August 5, 2013, plaintiff Jerrold V. Archer and his wife, derivatively, served a notice of claim upon the defendant Port Authority. On August 23, 2013, plaintiffs commenced the instant negligence action to recover damages against the defendant. Plaintiff now moves for, *inter*

alia, an order deeming the August 5, 2013 notice of claim timely. Defendant Port Authority cross moves to dismiss the action on the ground that plaintiffs failed to satisfy a condition precedent to bringing a lawsuit against it inasmuch as the notice of claim was not served at least 60 days before this action was commenced.

Defendant Port Authority is a bi-state entity created in 1921 by a compact between New York and New Jersey and approved by Congress. (McKinney's Uncons Laws of NY § 6404 [Compact Between New York and New Jersey Creating Port Authority].) As an agency of the State, defendant Port Authority enjoys the same sovereign immunity as the State of New York. (*Trippe v Port of N.Y. Auth.*, 14 NY2d 119, 123 [1964].)

The Port Authority, however, has consented to lawsuits against it on the condition that all actions against it are commenced within one year after the cause of action accrued, and if the action is one to recover damages, a notice of claim is served upon the Port Authority at least 60 days before such action is commenced. (McKinney's Uncons Laws of NY § 7107 [Suits Against The Port Authority]; *Ofulue v Port Auth. of N.Y. & N.J.*, 307 AD2d 258, 259 [2d Dept 2003]; see also *Estate of Pearlberg v Port Auth. of N.Y. & N.J.*, 210 AD2d 199, 200 [2d Dept 1994].) Compliance with the condition precedent of giving at least 60 days notice is mandatory and jurisdictional. (*Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250, 251 [1st Dept 1996].) The failure to comply with this condition will result in the withdrawal of defendant's consent to the lawsuit and compels dismissal of the action for lack of subject matter jurisdiction. (*Luciano v Fanberg Realty Co.*, 102 AD2d 94, 96 [1st Dept 1984].) Under (McKinney's Uncons Laws of NY § 7108, however, the court has the discretion to grant leave to serve a late notice of claim in situations involving the death, physical or mental incapacity of the claimant or where the claimant is a minor. (see *DeCicco v Port Auth. of N.Y. & N.J.*, 277 AD2d 24, 24-25 [1st Dept 2000].)

In the case at bar, as noted above, the notice of claim was served on August 5, 2013, and this action was commenced on August 23, 2013. Thus, the notice of claim clearly was not served at least 60 days before the action was commenced. Plaintiffs assert, however, that defendant received sufficient notice of the plaintiffs' claims through correspondence as well as the subject incident report. The court finds that such notice is insufficient to satisfy the requirements of the Unconsolidated Laws. The notice of claim requirement under Unconsolidated Laws § 7107, unlike that set forth in the General Municipal Law, is jurisdictional. (*Luciano v Fanberg Realty Co.*, 102 AD2d at 97.) Indeed, the lack of prejudice to the Port Authority does not

excuse noncompliance with the notice of claim requirements of Unconsolidated Laws § 7107. (*Luciano v Fanberg Realty Co.*, 102 AD2d at 97.)

As noted above, Unconsolidated Laws § 7107 expressly limits the service of a late notice of claim to situations involving the death, physical incapacity or mental incapacity of the claimant, or where the claimant is a minor. Plaintiff Jerrold V. Archer contends that he was under such a physical disability following the subject accident which prevented him from timely filing the notice of claim. Plaintiff states that he was hospitalized for more than a month following the accident and underwent surgery to repair a fractured hip. Plaintiff further avers that he returned to his home in South Carolina but suffered another fall in February 2013, which caused him to undergo additional months of treatment and rehabilitation. Plaintiff maintains that as a result of his injuries, he was in "no condition to effectively participate in, or contribute to, the preparation and filing" of a notice of claim.

The court finds that plaintiff's physical condition does not constitute a sufficient excuse for the failure to timely serve a notice of claim. There is no evidence that plaintiff's injuries and treatments prevented him from seeking the aid of counsel to prepare a notice of claim. (*cf. Matter of DeCicco v Port Auth. of N.Y. & N.J.*, 277 AD2d at 24 [noting "severe communication deficits" of the claimant].) Indeed, the record reveals that the plaintiffs' daughter, Amy Archer Flaherty, an attorney, represented her father in connection with his accident and prepared an Order to Show Cause in October 2012 seeking pre-action disclosure. In addition, Ms. Flaherty wrote to the defendant on November 20, 2012, requesting various documents relating to the accident. Thus, inasmuch as plaintiff was represented by an attorney, who prepared and served legal documents, there is no reason a notice of claim could not similarly have been prepared by the attorney. The legal work undertaken on behalf of the plaintiff indicates that the plaintiff was not more concerned with his physical and emotional health than in maintaining an action to recover damages. (see *Matter of Ramunno*, 202 AD2d 511, 512 [2d Dept 1994].) Moreover, even taking into account plaintiff's subsequent fall and hospitalization in South Carolina in February 2013, there is no reasonable explanation as to why the notice of claim was not served for an additional five months.

Plaintiffs also argue that their notice claim should be deemed timely under the recently enacted Uniform Notice of Claim Act, codified in CPLR 217-a. The purpose of the Act, effective

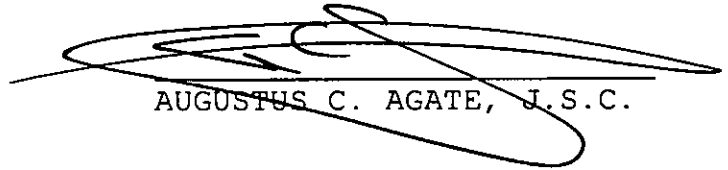
on June 15, 2013, is to create a uniform time for serving a notice claim and commencing actions against various governmental entities. (253 Siegel's Practice Review, New "Uniform Notice of Claim Act" at 2 [Jan. 2013].) Under the Act, there is a one-year and ninety day limitations period for actions for personal injury and property damage against any political subdivision of the state, any instrumentality or agency of the state or a political subdivision, any public authority or any public benefit corporation. The Act further requires that where an entity is entitled to receive a notice of claim, the notice must be served within the time period specified in General Municipal Law § 50-e, i.e., 90 days after the claim arises. (CPLR 217-a.) Plaintiffs assert that since CPLR 217-a expressly incorporates the General Municipal Law, the court can consider the factors set forth in General Municipal Law § 50-e[5] and exercise its discretion to permit the service of a late notice of claim.

Contrary to plaintiffs' assertions, however, CPLR 217-a is not applicable to the instant case. The new statute applies to actions and proceedings that accrued on or after June 15, 2013. (see L 2013, ch 24, as amended.) Here, plaintiff's accident occurred on August 23, 2012, and, thus, the action accrued on that date.

Accordingly, this motion by plaintiffs is denied in its entirety.

The cross motion by defendant to dismiss the action is granted, and the action is dismissed.

Dated: April 25, 2014


 AUGUSTUS C. AGATE, J.S.C.

FILED
 APR 28 2014
 COUNTY CLERK
 QUEEN'S COUNTY