

Matter of Williams v New York City Transit

2014 NY Slip Op 31667(U)

June 25, 2014

Sup Ct, New York County

Docket Number: 401870/2013

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Application of
GLORIA WILLIAMS,

INDEX NO. 401870/2013

MOTION DATE 3/6/14

Petitioner,

- v -

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT,

Respondent.

The following papers, numbered 1 to 9, were read on this petition for leave to serve a late notice of claim

Order to Show Cause —Verified Petition— Exhibits A-H

No(s). 1-3

Affirmation in Opposition — Exhibits A-C

No(s). 4

Reply Affidavit; Affidavit of Service

No(s). 5; 6

Reply Affirmation—Exhibit A [Affidavit], B—Affidavit of Service

No(s). 7-9

Upon the foregoing papers, it is **ADJUDGED** that this petition is decided in accordance with the annexed memorandum decision and judgment.

Copies to petitioner at 920 Baychester Ave # 2F, Bronx, NY 10475 and to respondent.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1409).

HON. MICHAEL D. STALLMAN

Dated: 6/23/14
New York, New York


_____, J.S.C.

1. Check one:.....
2. Check if appropriate:.....PETITION IS:
3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER
 SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
In the Matter of the Application of
GLORIA WILLIAMS,

Petitioner, Index No. 401870/2013

- against -

Decision and Judgment

NEW YORK CITY TRANSIT,

Respondent.

UNFILED JUDGMENT

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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

HON. MICHAEL D. STALLMAN, J.:

Petitioner *pro se* Gloria Williams seeks leave to serve a late notice of claim upon the New York City Transit Authority, sued herein as respondent New York City Transit. Respondent opposes the application.

BACKGROUND

It is undisputed that, on January 9, 2013, petitioner served a notice of claim upon respondent. The notice of claim states that, on September 21, 2012, around 6:30 p.m., she was a bus passenger on the M102 bus, bus number 5548, and that she was injured when the bus driver made a sudden stop on 110th Street and Lexington Avenue in Manhattan. (Petition, Ex F.) According to petitioner, "Driver was pulling into bus stop on 110st Lexington

Ave and he made sudden stop and I held on the pole and swang [*sic*] around and I hit my left knee on the seats that's in the front of the bus. Since then I've been in pain." (*Id.*)

By a letter dated January 31, 2013, respondent returned the notice of claim to petitioner, stating, "The Notice of Claim was not served within 90 days of the date of accident. A Notice of Claim filed against the New York City Transit Authority MUST BE SERVED WITHIN 90 DAYS AFTER THE INCIDENT, be notarized and in writing. Failure to file a claim in accordance with applicable statutes will result in its automatic disallowance." (Charles Opp. Affirm., Ex C.)

Petitioner apparently commenced a special proceeding in the Supreme Court, Bronx County on March 18, 2013. (Petition, Ex D.) It appears that, by decision and order dated September 12, 2013, Justice Larry Schachner denied the application, stating, "Petitioner's Order to Show Cause to file a late notice of claim is denied without prejudice to renew in New York County, which is the location of the alleged incident." (Petition, Ex A.)

On October 24, 2013, petitioner commenced this special proceeding by order to show cause. Petitioner claims that, in the four days after the alleged incident, "I called the 1800 number that is posted on the back of the MTA buses every day; which ended in me never getting a response from

anyone. Every time I called I did leave a message with my contact information via phone.” (Williams Reply Aff. ¶ 2.) According to petitioner, she spoke to a “Mr. Little from customer service” on October 16, 2012, who gave her the telephone number of the legal department, which allegedly did not return petitioner’s telephone calls. (*Id.*) Petitioner then claims that she got a different telephone number for the legal department from calling 311, and left messages at that telephone number. (*Id.*)

According to petitioner,

“On November 16, 2012 I called and spoke to someone from the personal injury department about getting a claim from [*sic*] and asked could I still put in a claim considering it was after the 90 days that is given to put in a claim and the response I got was that I can still put it because the office was closed due [*sic*] hurricane Sandy and that paperwork was backed up. In the following days I personally put in a claim at 130 Livingston Street. And I was contacted by Linda Jahns and she questioned me about the accident over the phone. The first question in her line of questions was: did the bus driver offer you any medical assistance and where [*sic*] you ok? I gave her answer of no to both questions and then she asked me what was the number of the bus I was on and I responded with 5548. In March of 2013 I received a letter of denial. From there I spoke to Ms. Hirren and she instructed me to put in a late notice of claim and to put the claim in the Bronx Supreme Court.

As time went by I never heard a response from anyone, when I went to follow up on what happened with the case I was told that the claimed [*sic*] that severed [*sic*] was never processed and I had to restart the whole process all over again. After doing all of this I was denied a renewal at the Bronx County Supreme Court by Judge Schachner for him to grant me a renewal at the New York County Supreme where the accident actually took place.”

* 5]

(*Id.*)

DISCUSSION

Public Authorities Law §§ 1212 (2) requires service of a notice of claim upon the NYCTA that is “within the time limited, and in compliance with all of the requirements of section [50-e] of the general municipal law.” General Municipal Law § 50–e (2) requires, among other things, that “the notice shall be in writing.” General Municipal Law § 50–e (1) requires that “the notice of claim shall . . . be served . . . within ninety days after the claim arises”, unless the claim involves wrongful death, which is not the case here.

Based on petitioner’s affidavit, petitioner became aware that she needed to serve a notice of claim upon respondent and that she knew of the deadline when she purportedly spoke to “someone from the personal injury department” on November 16, 2012. (Williams Reply Aff. ¶ 2.) Petitioner’s purported conversations with someone from the “personal injury department” do not satisfy the requirement of a written notice of claim. Petitioner appears to have believed that the 90 day deadline had passed,¹ because she claims that she “asked could I still put in a claim *considering it was after the 90 days that is given to put in a claim. . .*” (*Id.* [emphasis supplied].) Although

¹ Ninety days after September 21, 2012, the alleged date of the incident, fell on Thursday, December 20, 2012.

petitioner claims that “in the following days I personally put in a claim at 130 Livingston Street” (*id.*), the only written notice of claim in the record before the Court is a notice of claim that was undisputedly served upon respondent on January 9, 2013. As petitioner recognizes, the notice of claim sworn to on January 9, 2013 was served more than 90 days after plaintiff was allegedly injured.

Pursuant to General Municipal Law § 50-e (5), the Court has discretion to grant leave to serve a late notice of claim under certain statutorily permitted circumstances.

“In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50–e(5), the key factors considered are ‘whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the [authority] acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the [authority] in its defense. Moreover, the presence or absence of any one factor is not determinative.’”

(*Plaza v New York Health & Hospitals Corp. [Jacobi Medical Center]*, 97 AD3d 466, 467 [1st Dept 2012] [internal citations omitted]; *Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005].) “Proof of actual knowledge, or lack thereof, ‘is an important factor in determining whether the defendant is substantially prejudiced by such a delay.’” (*Plaza*, 97 AD3d at 471; see e.g. *Padilla v Department of Educ. of City of N.Y.*, 90 AD3d 458 [1st

Dept 2011][“The most important factor that a court must consider in deciding such a motion is whether corporation counsel, . . . ‘acquired actual knowledge of the essential facts constituting the claim within the time specified’”].)

Respondent opposes the application on the grounds that petitioner did not demonstrate a reasonable excuse for failing to serve a timely notice of claim, and that respondent has been prejudiced by late service. According to respondent, its law department was never closed during Hurricane Sandy. Respondent submits an affidavit from Linda Jahns, a manager in the Law Department Claims Unit for respondent. (Gosin Reply Affirm. Ex A [Jahns Aff.]) Jahns states that respondent’s Law Department, “which includes the Claims Unit was open throughout Hurricane Sandy and continued to conduct business as normal.” (Jahns Aff. ¶ 3.)

Whether respondent’s Law Department and Claims Unit remained operational during and after Hurricane Sandy is irrelevant to question of whether petitioner had a reasonable excuse for serving a late notice of claim. As mentioned above, petitioner claims that she spoke to an unidentified individual “from the personal injury department” on November 16, 2012, and “in the following days I personally put in a claim at 130 Livingston Street” (Williams Reply Aff. ¶ 2.) If that were true, that notice of claim would have

been served within 90 days after the incident on September 21, 2012. Thus, whether respondent's Law Department and Claims Unit remained operational during and after Hurricane Sandy before petitioner purportedly served a notice of claim in person "[i]n the following days" after November 16, 2012 is irrelevant.

According to Williams, "[a]s time went by I never heard a response from anyone, when I went to follow upon with the case I was told that the claimed [sic] that severed [sic] was never processed and I had to re start [sic] the whole process all over again." (*Id.*) Thus, petitioner might be asserting that the notice of claim was served late because respondent "never processed" her original notice of claim.

However, petitioner has not established that respondent failed to process her original notice of claim, because petitioner has not met her burden of demonstrating that she actually served a notice of claim upon respondent back in November 2012. Petitioner has not submitted a copy of the notice of claim that she purportedly sent within days of speaking to "someone from the personal injury department" on November 16, 2012. Thus, petitioner has not demonstrated a reasonable excuse as to why a notice of claim was served on January 9, 2013, more than 90 days after the alleged incident.

But the inquiry does not end there. “[T]he absence of a reasonable excuse is not, standing alone, fatal to the application.” (Matter of Porcaro, 20 AD3d at 358 [internal citations omitted].) Petitioner claims that she spoke to Linda Jahns at some time after November 2012 and told her about the incident. Notably, Jahns does not deny having such a conversation in her affidavit submitted in opposition to petitioner’s application. Petitioner has therefore met her burden of establishing that respondent acquired actual knowledge of the essential facts of petitioner’s claim within 90 days after the claim arose, or a reasonable time thereafter. Respondent’s actual knowledge of the essential facts constituting plaintiff’s claim undermines respondent’s contention of prejudice. (*Miranda v New York City Tr. Auth.*, 262 AD2d 199, 200 [1st Dept 1999].) The Court therefore does not find that that respondent has suffered prejudice resulting from service of this late notice of claim.

Having considered all the factors in permitting service of a late notice of claim, the Court therefore grants the petition.

CONCLUSION

Accordingly, it is hereby


ADJUDGED that the petition is granted; and the notice of claim sworn to on January 9, 2013 annexed to the moving papers as Exhibit F is deemed

timely served, *nunc pro tunc*.

Copies to petitioner at 920 Baychester Ave # 2F, Bronx, NY 10475 and to respondent.

Dated: June 25, 2014
New York, New York

ENTER:



J.S.C.

FILED IN JUDGE [illegible] COURT OF CLERKS

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).