

Fabiitti v City of New York

2014 NY Slip Op 31674(U)

May 7, 2014

Sup Ct, Queens County

Docket Number: 705780/13

Judge: Kevin J. Kerrigan

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

Sandra L. Fabiitti and David Fabiitti,
Claimants,
- against -

Index
Number: 705780/13
Motion
Date: 4/29/14

The City of New York and New York City
Industrial Development Agency,
Respondents.

Motion
Cal. Number: 75
Motion Seq. No.: 3

The following papers numbered 1 to 7 read on this petition for leave to serve and file a late notice of claim.

Table with 2 columns: Paper Description, Papers Numbered. Includes 'Order to Show Cause-Affirmation-Exhibits' and 'Affirmation in Opposition-Exhibit'.

Upon the foregoing papers it is ordered that the motion is decided as follows:

Application by petitioners for leave to serve a late notice of claim pursuant to General Municipal Law §50-e(5) is denied.

Petitioner allegedly sustained injuries on May 27, 2013 while attending a Mets game at Citi Field in Queens County when an unidentified person five rows behind her, whom petitioner alleges was drunk and disorderly, fell on her, causing her to strike her head on the seat in front of her. Petitioner wishes to assert claims for inadequate and negligent security and supervision.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioners, therefore, had until August 27, 2013 to serve a notice of claim. On January 6, 2013, a proposed order to show cause for leave to serve a late notice of claim was received in chambers for signature. This

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COUNTY CLERK
QUEENS COUNTY

Court declined to sign said proposed order to show cause, without prejudice, upon the ground that petitioners failed to submit a working copy of all papers in support of the order to show cause, as required by this Court's Part Rules. Petitioners' counsel thereafter submitted the instant order to show cause to this Court for signature on February 18, 2014, which this Court signed and which counsel served upon defendants on February 21, 2014.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

The only excuse proffered by plaintiff in her affidavit in support of the petition is that "the seriousness of my injuries only recently came to light and I feel it is my responsibility to file this action". However, a lack of awareness of the possibility of a lawsuit does not constitute a reasonable excuse, as a matter of law (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]). Moreover, petitioner's claim that she was unaware of the seriousness of her injuries is belied by her averment that she was taken to the hospital by ambulance from the scene of the accident and that she was seriously injured. Furthermore, petitioner and petitioner's counsel fail to proffer any excuse as to the delay of over two and one-half months from the date petitioner avers that she retained counsel on October 22, 2013 to commence an action for her injuries and January 6, 2013 when counsel first submitted a proposed order to show cause for leave to serve a late notice of claim.

Petitioners have also failed to demonstrate that respondents acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The acquisition of actual knowledge of the facts

constituting the claim is a factor that must be given particular consideration in determining whether to grant leave to file a late notice of claim (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]).

Petitioners' counsel contends that respondents acquired actual knowledge of the facts constituting the claim by virtue of the fact that stadium security was notified of the alleged incident on the night of the incident.

It is well-established that concerning the acquisition of actual knowledge, "What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]).

Petitioner's counsel's bare assertion that stadium security was notified of the incident on the night of the incident fails to establish that respondents acquired actual knowledge of the essential facts underlying the claim at said time (see generally Beretey v. New York City Health & Hospitals Corp., 56 AD 3d 591 [2nd Dept 2008]; Doyle v. Elwood Union Free School Dist., 39 AD 3d 544 [2nd Dept 2007]; Henriques v. City of New York, 22 AD 3d 847 [2nd Dept 2005]).

Counsel also argues that the petition for leave to serve a late notice of claim "is being made within approximately 2 months of the elapsed time for a Notice of Claim to be submitted" and, therefore, "due to such a short lapse of time that the application to serve a late notice of claim should be granted".

In the first instance, petitioners' first application for leave to serve a late notice of claim was not presented to this Court until over 4½ months after the expiration of the 90-day deadline for serving a notice of claim, which this Court does not consider to be a reasonable time. Even if the application had been made two months after the expiration of the 90-day deadline, this Court does not consider such a delay to be a reasonable time. In any event, even were this Court to consider a delay of 4½ months, or two months, a reasonable time for purposes of actual knowledge, a petitioner may not rely upon the service of a late notice of claim, or petition therefor, to establish actual knowledge (see Mack v. City of New York, 265 AD 2d 308 [2nd Dept 1999]).

Finally, it is the burden of the claimant seeking leave to file a late notice of claim to establish that the municipality would not suffer prejudice if a late notice of claim were allowed

(see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138, supra). Petitioners have failed not only to demonstrate, but to allege, that respondents would suffer no prejudice if the Court were to allow them to serve a notice of claim at this late juncture.

Accordingly, the petition is dismissed. Respondents may enter judgment accordingly.

Dated: May 7, 2014



KEVIN J. KERRIGAN, J.S.C.