Bowens v City of New York
2014 NY Slip Op 31676(U)
May 21, 2014
Sup Ct, Queens County
Docket Number: 706134/13
Judge: Kevin J. Kerrigan

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Ruth Bowens,

Petitioner,

- against -

The City of New York,

Respondents.

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Index Number: 706134/13

Motion Date: 4/3/14

Motion Cal. Number: 25

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Notice of Petition-Petition-Affidavit-Affirmation...	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply-Exhibits.....	8-10

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

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

Petitioner, a New York State Court Officer, allegedly sustained injuries on February 28, 2013 when an elevator in which she was a passenger in the New York City Civil Court building at 89-17 Sutphin Boulevard in Queens County, where she is employed, suddenly dropped from the fourth floor to an area between the third and second floors, where it stopped and its doors opened. It is undisputed that the Civil Court building is owned and maintained by the City. This Court notes, parenthetically, that petitioner, in her affidavit in support of the petition, erroneously alleges that she was assigned to the Supreme Court Courthouse at 88-11 Sutphin Boulevard and that the accident occurred therein. In fact, she is assigned to the Civil Court at 89-17 Sutphin Boulevard and the

accident occurred in the Civil Court building. Petitioner's affidavit, thus, appears to have been prepared by her counsel, who made the aforementioned factual error.

A condition precedent to commencement of a tort action against a municipality is the service of a notice of claim upon the municipality 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]). Petitioner filed the instant petition for leave to serve a notice of claim on December 27, 2013, almost seven months past the 90-day deadline.

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]).

Petitioner avers in her affidavit that following the accident, she received conservative care and treatment, and physical therapy. She states that she initially sought legal counsel from another attorney who declined to take any legal action on her behalf because he did not think her injuries were severe, and that she did not seek legal advice again until recently, when she realized the extent of her injuries after she underwent spinal surgery for herniations, and that it was only upon consulting with her present counsel on November 21, 2013 that she was apprised for the first time that a notice of claim must be filed within 90 days of the injury.

Ignorance of the law regarding the necessity of filing a timely notice of claim or the lack of awareness of the possibility of a claim do not constitute reasonable excuses (see Felice v. Eastport/South Manor Cent. School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]; D'Anjou v. New York City Health and Hospitals

Corporation, 196 AD 2d 818 [2nd Dept 1993]). Her allegation concerning the severity of her injuries and her surgery is unsupported by the affirmation of a physician (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]) and may not be considered. Moreover, petitioner fails to state when exactly she found out that her injuries were more severe than she was first led to believe and when she underwent surgery. Indeed, no medical evidence of petitioner's injuries whatsoever is annexed to the petition. Thus, petitioner has failed to proffer any cognizable excuse for her failure to serve a timely notice of claim.

Petitioner has also failed to demonstrate that the City acquired timely actual knowledge of the facts underlying her claim. Petitioner's counsel contends that the City acquired timely actual knowledge by virtue of the fact that the subject elevator was taken out of service by the City and, thus, that the City was afforded the opportunity to promptly investigate the cause of the elevator's malfunction.

"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]). Moreover, the municipality does not acquire actual knowledge of the facts underlying the claim merely because its employees were at the scene of the accident and may have had general knowledge that a wrong had been committed (see Morrison v. NYC Health and Hospitals Corp., 244 AD 2d 487 [2nd Dept 1997]).

The passenger entrapment report prepared by an elevator mechanic for the City's Department of Citywide Administrative Services (DCAS) on the date of the accident, annexed to petitioner's counsel's reply, merely recites, "Car stuck two feet below floor. Female officer didn't want me to move car with her inside. So I used a chair for her to get out of car with main line switched off." It also indicates that no injuries were reported and no medical assistance was required. Therefore, since this report does not apprise the City of any causal nexus between the elevator malfunction and any injuries, it did not serve to impart any knowledge to the City of the facts comprising petitioner's claim so as to have allowed it to perform a timely investigation.

Consequently, counsel's additional argument that the City would suffer no prejudice because it acquired timely actual knowledge of the facts underlying petitioner's claim through the aforementioned report is without merit. In any event, this Court may not reach the issue of prejudice, since even if there were

none, it would be an abuse of discretion to grant the instant petition where petitioner has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see National Grange Mutual Ins. Co. v. Town of Eastchester, 48 AD 3d 467, supra; Hebbard v. Carpenter, 37 AD 3d 538 [2nd D`ept 2007]; Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

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

Dated: May 21, 2014

KEVIN J. KERRIGAN, J.S.C.