

Grayson v New York City Tr. Auth.

2014 NY Slip Op 32546(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 152499/2012

Judge: Michael D. Stallman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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

SHELBY GRAYSON,

INDEX NO. 152499/12

Plaintiff,

MOTION DATE 8/4/14

- v -

MOTION SEQ. NO. 001

**NEW YORK CITY TRANSIT AUTHORITY and BENJAMIN
CLIFFORD,**

Defendants.

The following papers, numbered 7 to 11, 14, 16, were read on this motion for summary judgment

Notice of Motion; Affirmation in Support; Exhibits A; B; C

█ No(s). 7; 8; 9; 10; 11

Affirmation in Opposition

█ No(s). 14

Reply Affirmation

█ No(s). 16

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

Upon the foregoing papers, it is ORDERED that a framed issue hearing is directed, and the motion is stayed pending such framed issue hearing, and that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court (or to hear and determine, upon stipulation of the parties) on the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose: whether plaintiff’s counsel mailed the notice of claim to the New York City Transit Authority (NYCTA) and whether the NYCTA received it within the statutory ninety day period; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in

(Continued . . .)

Grayson v New York City Tr. Auth., Index No. 152499/12

accordance with the Rules of that Part, shall assign this matter to an available JHO/Special Referee to hear and report as specified as above (or to hear and determine, upon stipulation of the parties), and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at <http://www.courts.state.ny.us/suptcmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part or by the JHO/Special Referee in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) and, except as otherwise directed by the assigned JHO/Special Referee, the trial of the issue specified above shall proceed day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issue presented in any motion identified in the first
(Continued . . .)

Grayson v New York City Tr. Auth., Index No. 152499/12

paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Plaintiff alleges that, on August 17, 2011, she was injured during a collision with her vehicle and a NYCTA bus operated by Benjamin Clifford at or near the intersection of West 43rd Street and 12th Avenue in Manhattan. Plaintiff's counsel alleges that he personally mailed a notice of claim to the NYCTA on November 11, 2012. He specifically states in his affirmation,

“On November 11, 2011, I personally prepared the Notice of Claim and a cover letter to the [NYCTA]. I then personally deposited the aforesaid Notice in a post paid properly addressed envelope in a United States Postal Service mailbox in the Bronx on November 11, 2011 with a Certified Mail label and return receipt attached to the envelope.

The reason I recall this event was that it had been a holiday on Friday, November 11, 2011; the courts, government offices and banks were closed. As such, the clerical staff of our firm had the day off. I prepared the Notice myself together with the Certified Mail label. It was my intention to bring it to the Post Office but when I drove to the Post Office on Lafayette Avenue, Bronx, NY, I realized it too was closed for the holiday. Rather than waiting until the following Monday to bring it to the Post Office, I deposited the Certified Mail in the mail box.” (Chinitz Opp. Affirm. ¶¶ 3-4.)

Defendants move to dismiss the complaint on the ground that plaintiff did not serve a timely notice of claim on the NYCTA. In support of their motion, defendants submit a copy notice of claim from plaintiff's counsel and a copy of the envelope in which it was mailed with a US postage seal dated November 18, 2011. (Grayson Affirm. Ex. C.) Defendants argue that the service of the notice of claim is defective as it was mailed on November 18, 2011, which is outside the statutory ninety day period within which a notice of claim may be served.

(Continued . . .)

Grayson v New York City Tr. Auth., Index No. 152499/12

Plaintiff opposes the motion, arguing that under General Municipal Law § 50-(e) (3) (b), service of the notice of claim by certified mail “shall be complete upon deposit of the notice of claim . . . in a post office or official depository under exclusive care and custody of the United States post office department within the state.” Plaintiff’s counsel states in his affirmation, “Inasmuch as I deposited the certified mail . . . , into a USPS mail box in New York on November 11, 2011, prior to the expiration of the 90 day limit, then the Notice of Claim was properly served upon this defendant in a timely manner.”

Public Authorities Law § 1212 (2) requires that,

“an action against the authority founded on tort shall not be commenced . . . unless a notice of claim shall have been served on the authority within the time limited, and in compliance with all the requirements of section fifty-e of the general municipal law.”

General Municipal Law § 50-(e) requires that the notice of claim be served personally or by registered or certified mail within ninety days after the claim arose.

Here, there is a question of fact as to whether plaintiff’s counsel mailed the notice of claim to the NYCTA and whether the NYCTA received it within the ninety day period. Therefore, the Court directs a framed issue hearing before a JHO/Special Referee as to whether plaintiff’s counsel mailed the notice of claim to the NYCTA and whether the NYCTA received it within the ninety day period. Defendants’ motion is held abeyance until receipt of a report / recommendations from the JHO/Special Referee, or a filed determination of a JHO/Special Referee to Determine, should the parties stipulate to the JHO/Special Referee determining this question.

Dated: 10/1/14 HON. MICHAEL D. STALLMANN, J.S.C.
New York, New York

- 1. Check one:..... CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE