

**Lapsley-Cockett v Metropolitan Tr. Auth.**

2014 NY Slip Op 32550(U)

September 29, 2014

Supreme Court, New York County

Docket Number: 451341/13

Judge: Michael D. Stallman

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

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TONYA LAPSLEY-COCKETT and NOEL  
COCKETT,

Plaintiff,

Index No. 451341/13

- against -

METROPOLITAN TRANSIT AUTHORITY and  
NEW YORK CITY TRANSIT AUTHORITY,

**Decision and Order**

Defendant.

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**HON. MICHAEL D. STALLMAN, J.:**

Defendants Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) move for summary judgment. Plaintiffs oppose the motion.

**BACKGROUND**

Plaintiffs allege that, on April 20, 2012, plaintiff Tonya Lapsley-Cockett was injured when she was struck by the subway car doors while boarding the downtown 4 train at the 14<sup>th</sup> Street Union Square (IRT Division) subway station in Manhattan. On the day of the alleged incident, plaintiff Lapsley-Cockett emailed the MTA explaining the incident and stated, "How can I make an official report to the MTA and have an MTA medic document my complaint. Please advise." (Conklin Opp. Affirm. Ex. A.) The MTA responded to plaintiff by email dated May 11, 2012, stating,

"Please note that you may file a Notice of Claim for personal injury with New York City Transit Authority's Law Department. Should you have additional questions or wish to request Notice of Claim forms, you should contact the Claims Division of our Law Department at (718) 694-3950."

(*Id.*) It appears undisputed that plaintiffs' counsel sent a notice of claim by mail (although it is not clear whether it was sent by certified or registered mail or first class mail) dated July 2, 2012 and sworn to by plaintiff Lapsley-Cockett on July 5, 2012 to the "Metropolitan Transit Authority" at 347 Madison Avenue, New York, NY 10017, and that this document was received by the Metropolitan Transportation Authority (MTA) which is headquartered at that address. (Gosin Affirm. Ex. A.)

Plaintiff Lapsley-Cockett alleges that she personally mailed a notice of claim to the NYCTA on July 3, 2012. She specifically states in her affidavit, "On July 3, 2012, I filled out the form in its entirety and signed it before a Notary Public. On July 3, 2012, I made a copy of the Notice of Claim for my records and mailed the entire Notice of Claim by regular U.S. mail, with affixed postage, having multiple attached carbonless copies to the [NYCTA], 130 Livingston Street, 10<sup>th</sup> Floor, Brooklyn, New York 11201-5109." On August 24, 2012, plaintiff Lapsley-Cockett's statutory hearing was held.

Defendants move to dismiss the complaint on the grounds that plaintiffs did not properly serve a timely notice of claim on the NYCTA and that the MTA is not a proper party. Defendants submit the notice of claim from plaintiffs' counsel dated July 2, 2012 and sworn to on July 5, 2012 by plaintiff Lapsley-Cockett that names only the "Metropolitan Transit Authority." (Gosin Affirm. Ex. A.) Defendants admit receipt of the July 2, 2012 notice of claim on July 11, 2012 "for the sole purpose of NYCTA representing the MTA in this matter" and deny receipt of the July 3, 2012 notice of claim. (Gosin Reply Affirm. ¶¶ 4-5.)

Plaintiffs oppose the motion and cross-move for an order deeming the July 3, 2012 notice of claim purportedly served by plaintiffs valid. Plaintiffs submit the affidavit of plaintiff Lapsley-Cockett, in which she asserts that she mailed a notice of claim by regular mail to the NYCTA on July 3, 2012, which was within the ninety day period as required by General Municipal Law § 50-(e) and Public Authorities Law § 1212 (2). (See Conklin Opp. Affirm. Ex. E.) Plaintiffs also submit a copy of a completed NYCTA notice of claim form dated and notarized July 3, 2012. (See *id.* Ex. B.)

Plaintiffs argue that, under General Municipal Law § 50-(e) (3) (c), because the NYCTA failed to specify a defect in the manner of service

within thirty days of plaintiff Lapsley-Cockett's mailing of the notice of claim to the NYCTA, the notice of claim should be deemed valid. Plaintiffs also argue that under the aforementioned statute, an irregularity in the manner of service may be avoided because the NYCTA demanded and held plaintiff Lapsley-Cockett's statutory hearing.

## DISCUSSION

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, plaintiffs failed to properly serve the NYCTA within the ninety day period. Plaintiffs should have served the notice of claim on the NYCTA personally or by registered or certified mail, but did not.

However, General Municipal Law § 50-(e) (3) (c) provides as follows:

“If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the *public corporation against which the claim is made demands* that the claimant or any other person interested in the claim be examined in regard to it, *or if the notice is actually received* by a proper person within the time specified by this section, and *the public corporation fails to return the notice*, specifying the defect in the manner of service, within thirty days after the notice is received.” (emphasis added.)

As plaintiffs indicate, “section 50-(e) (3) (c) was intended to cure improper methods of service . . . .” (*Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606, 611 [2005].) However, plaintiffs argue that the irregularity of service can be avoided because the NYCTA held a statutory hearing for one of the plaintiffs; the NYCTA asserts that the statutory hearing was held by the NYCTA on behalf of the MTA not the NYCTA. However, according to the statutory hearing transcript, the Hearing Examiner for the NYCTA said, “the purpose of the examination” was to “inquire as to a claim being made by you [plaintiff Lapsley-Cockett] against the Transit Authority.” (Conklin Opp. Affirm. Ex. F. at 3.) The NYCTA did not produce evidence for its assertion that the hearing was held on behalf of the MTA. The NYCTA and MTA have not come forward with the letter demanding the statutory hearing, neither have the plaintiffs. The demand letter would indicate the name of the authority demanding it and might have said on which authority’s (or authorities’) behalf the hearing would be held. General Municipal Law § 50-(e) (3) (c) requires that the “public corporation against which the claim is made demand” the statutory hearing. Here, it is not clear whether the NYCTA or the MTA demanded the statutory hearing.

As to the second part of General Municipal Law § 50-(e) (3) (c), plaintiffs provide an affidavit of plaintiff Lapsley-Cockett, in which she

asserts that she mailed the notice of claim to the NYCTA within the ninety day period, plus a copy of the notice of claim form dated July 3, 2012. (See Conklin Opp. Affirm. Ex. E, Ex. B.) However, plaintiffs provide no additional proof that the notice of claim was indeed sent by regular mail or that the NYCTA received it within the ninety day period. Defendants provide a notice of claim submitted by plaintiffs' counsel addressed only to the MTA; they assert that the NYCTA did not receive a notice of claim. (Gosin Affirm. Ex. A.) It cannot be said as a matter of law, on this showing, whether this affidavit and the plaintiffs' copy of the July 3, 2012 notice of claim form are sufficient to meet the requirements of General Municipal Law § 50-(e) (3) (c).

“Section 50-e (subd 3, par [c]) permits an exception to that rule when the city actually receives a notice of claim sent by some other means and fails to timely reject it. In the opinion of this court, the plaintiff cannot graft the common-law presumption on to that specific statutory exception to the general provisions of section 50-e. Rather, the plaintiff must prove actual receipt in order to avail herself of the provisions of section 50-e (subd 3, par [c]). To hold otherwise would permit the common-law presumption of regularity to expand the section 50-e (subd 3, par [c]) exception to the extent of engulfing the entire section 50-e scheme, a result clearly not contemplated by the Legislature.”

(*Krieger v City of New York*, 118 Misc 2d 537, 539 [Sup Ct Queens County 1983] [rejecting the applicability of the presumption of regularity in mail delivery and finding no proof of actual receipt by the City of New York

where petitioner alleged she mailed notice of claim to the City]; see also *Burr v Eveready Ins. Co.*, 253 AD2d 650, 651 [1st Dept 1998] [finding that testimony as to an office practice or procedure in the regular course of business is sufficient to establish presumption of mailing and receipt of insurance claim letter, but presumption was sufficiently rebutted by an unexplained irregularity in copy of the letter introduced as evidence]; *Matter of Allstate Ins. Co. (Patrylo)*, 144 AD2d 243, 246 [1st Dept 1988] [holding that postal receipts were sufficient to raise a presumption that notice had been mailed and received by insurer, even though the insurer claimed that it did not have any notice of claims until a demand for arbitration]; *Matter of Carter v Motor Veh. Acc. Indem. Corp.*, 49 AD3d 1169 [4th Dept 2008] [holding that petitioner established presumption of mailing by affidavit of petitioner's counsel and respondent failed to rebut presumption.]

The parties' conflicting submissions and assertions raise factual questions and credibility issues. Given these issues and the potential for fraud in applying the statutory exception of General Municipal Law § 50-(e) (3) (c), the Court directs a framed issue hearing before a Judicial Hearing Officer ("JHO") or Special Referee as to whether the statutory hearing was demanded by the NYCTA or the MTA and whether plaintiff Lapsley-Cockett mailed the July 3, 2012 notice of claim to the NYCTA and whether the

NYCTA received it within the ninety day period. Defendants' branch of the motion seeking to dismiss the complaint as against the NYCTA and plaintiffs' cross motion seeking to deem the notice of claim served on the NYCTA are held in 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 these questions.

The complaint must be dismissed as against the MTA. "It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Delacruz v Metro. Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007], quoting *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984].) Therefore the branch of the motion seeking to dismiss the complaint as against the MTA is granted.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of defendants' motion seeking to dismiss the MTA is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by

the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that a framed issue hearing is directed and that a JHO/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 issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: whether the statutory hearing was demanded by the MTA or the NYCTA and whether plaintiff Tonya Lapsley-Cockett mailed the July 3, 2012 notice of claim to the NYCTA and whether the NYCTA received the July 3, 2012 notice of claim within the ninety day period; and it is further

ORDERED that the branch of defendants' motion seeking to dismiss defendant NYCTA and plaintiffs' cross motion to deem the notice of claim served are held in abeyance pending receipt of the report and recommendations of the JHO/ Special Referee and the determination of this Court thereon, or the filing of the determination of the JHO/ Special Referee to Determine; 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](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in 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 plaintiffs 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/supctmanh/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 issues 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.

Dated: September 29, 2014  
New York, New York

ENTER:

  
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J.S.C.

HON. MICHAEL D. STALLMAN