

Shiwnath v Mendez-Cruz

2014 NY Slip Op 33229(U)

March 5, 2014

Supreme Court, Queens County

Docket Number: 703283/2012

Judge: Bernice D. Siegal

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ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Nandranie Shiwnath,

Plaintiff,

-against-

Gerardo Mendez-Cruz, American Flag Moving, Inc.,
Keith A. James and MTA Bus Company,

Defendants.

-----X

Index No.: 703283/12
Motion Date: 9/26/13
Motion Cal. No.: 164
Motion Seq. No.: 2

The following papers numbered 1 to 15 read on this motion for an order pursuant to CPLR §3211(a)(2), (a)(5), and (a)(7), dismissing the complaint as against the defendants Keith A. James and MTA Bus Company (“Defendants”) on the grounds that plaintiff has failed to comply with a condition precedent, prescribed by Public Authorities Law 1276(1) and (2), such that this Court has no subject matter jurisdiction and/or that the plaintiff has failed to state a cause of action. The defendants further move for motion costs.

| | PAPERS NUMBERED |
|---|--------------------|
| Notice of Motion - Affidavits-Exhibits..... | 1 - 4 |
| Notice of Cross-Motion..... | 5 - 9 |
| Reply Affirmation and Opposition to Cross-Motion..... | 10 - 12 |
| Reply Affirmation..... | 13 - 15 |

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Keith A. James and MTA Bus Company (“MTA”) (collectively as “Defendants”) move for an Order pursuant to CPLR §3211(a)(2), (a)(5), and (a)(7), dismissing the complaint on the grounds that plaintiff has failed to comply with a condition precedent, prescribed

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QUEENS COUNTY

by Public Authorities Law 1276(1) and (2), such that this Court has no subject matter jurisdiction and/or that the plaintiff has failed to state a cause of action.

Plaintiff, Nandranie Shiwnath (“Plaintiff”) cross-moves for an order pursuant to CPLR 2215, to amend the notice of claim, *nunc pro tunc* pursuant to General Municipal Law 50-e(6) or to file a late notice of claim *nunc pro tunc* pursuant to GML 50-e(6).

The matter was set down for conference on December 18, 2013.

Facts

On or about May 1, 2012, Plaintiff served a Notice of Claim upon the City of New York, New York City Transit Authority and Metropolitan Transit Authority. However, Plaintiff failed to serve the Notice of Claim upon the defendant MTA Bus Company. By letter dated May 17, 2012, the Transit Authority notified Plaintiff’s counsel that the bus in question was not owned or operated by them. Plaintiff never amended the Notice of Claim to name MTA Bus Company.

On December 20, 2012, plaintiff filed her summons and complaint naming MTA Bus Company as defendants. MTA’s first affirmative defense was that Plaintiff failed to obtain jurisdiction over the answering defendants pursuant to Public Authorities Law.

As of the date of Defendants’ answer, Plaintiff’s time to serve an amended notice of claim upon the MTA Bus Company had not expired.

Plaintiff states that it received correspondence from the MTA Bus Company on September 11, 2012 wherein the MTA Bus Company stated that the “claimant is hereby required to appear and be sworn to testify as to all facts relative to the above claim presented by him to the MTA Bus Company.” In addition, the correspondence indicated that Plaintiff Nandranie Shiwnath is the claimant and assigned a file number for the accident.

Discussion

The statutory requirement for service of a notice of claim is a condition precedent to the commencement of the action in the same way as is the service of a summons. (see *Chauhan v. New York City Transit Authority*, 78 A.D.3d 1176 [2nd Dept 2010].) Furthermore, “the failure to serve a timely notice of claim may be raised any time prior to trial.” (*Wade v. New York City Health and Hospitals Corp.*, 16 A.D.3d 677 [2nd Dept 2008].) Here, the petitioner failed to serve a notice of claim upon the appellants within the requisite statutory period, and failed to timely bring an application for leave to serve a late notice of claim. (see *Chauhan v. New York City Transit Authority*, 78 A.D.3d 1176 [2nd Dept 2010])[denying application to serve a late notice of claim when petitioner failed to serve a notice of claim upon the appellants within the requisite 90-day statutory period, and failed to make her application for leave to serve a late notice of claim within one year and 90 days of the accrual date of the claim] citing *Pierson v City of New York*, 56 N.Y.2d 950 [1982].) Accordingly, pursuant to Public Authorities Law 1276(1), the failure to give proper Notice is a fatal defect and the complaint must be dismissed.

Plaintiff now cross-moves to amend the Notice of Claim, *nunc pro tunc*, pursuant to General Municipal Law 50-e(6) or, in the alternative, for an Order granting Plaintiff leave to file a late Notice of Claim, *nunc pro tunc*, pursuant to General Municipal Law 50-e(6) against defendant MTA Bus Company. Plaintiff argues that the correspondence from the MTA Bus Company on September 11, 2012 is proof that the MTA Bus Company was on notice of Plaintiff’s claim.

However, as the MTA Bus Company notes in reply, General Municipal Law does not apply to the MTA Bus Company as General Municipal Law only applies to municipalities. The court notes that Public Authorities Law 1276 is the statute that governs the MTA Bus Company.

However, even if the General Municipal Law applied to the MTA Bus Company, *nunc pro tunc* amendment would not be available to the plaintiff. General Municipal Law 50-e(6) states that

an application for leave to serve a late notice may be granted, in the court's discretion, to extend the time to serve a Notice of Claim provided that the "extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation." The within cause of action accrued on April 12, 2012. "The court lacks authority to grant a motion for leave to serve a late notice of claim that is made after the 1-year-and-90-day statute of limitations has expired, unless the statute has been tolled." (*Young Soo Chi v. Castelli*, 112 A.D.3d 816 [2nd Dept 2013]; see General Municipal Law §§ 50-e[5]; 50-i[1].) Herein, the applicable statute of limitations expired on July 12, 2013 and the within cross-motion to serve a late notice of claim was brought on August 22, 2013. Furthermore, Plaintiff was put on notice, by the letter from the Transit authority on May 17, 2012, that the subject bus was not owned by the Transit Authority. Despite being in receipt of this information, Plaintiff failed to failed to move *nunc pro tunc* until filing the within cross-motion. Even if the May 17, 2012 letter failed to put the Plaintiff on notice, the original motion to dismiss put the Plaintiff on notice and afforded Plaintiff approximately two months to file a timely motion but Plaintiff failed to do so.¹

Furthermore, permission to file a late Notice of Claim, *nunc pro tunc*, pursuant to General Municipal Law 50-e(6) against defendant MTA Bus Company is not applicable herein. General Municipal Law allows for the amendment of an already filed Notice of Claim with respect to a "mistake, omission, irregularity or defect..." of a non-substantive nature. (*Candelario v. MTA Bus Co.*, 21 Misc.3d 1148(A) [Sup. Ct. Bronx County 2008]; citing *Zwecker v. Clinch*, 279 A.D.2d 572 [2nd Dept 2001][holding that "General Municipal Law § 50-e(6) does not permit amendments to a notice of claim that are substantive in nature."].) The within application to amend is clearly

¹Defendant moved to dismiss in April of 2013, however that motion was marked off the calendar resulting in Defendant filing the within motion to dismiss.

substantive in nature.

Plaintiff's contention that the No-Fault application was sufficient to act as a statutory Notice of Claim is without merit. (*Kossifos v Liberty Lines Tr.*, 277 A.D.2d 205 [2nd Dept 2000])[rejecting plaintiff's contention that her no-fault application constituted a sufficient notice of claim within the meaning of General Municipal Law § 50-e .]; *Delisca v Liberty Lines Tr.*, 272 A.D.2d 291 [2nd Dept 2000].)

Finally, Plaintiff contends that the Defendants "acted with unclean hands" and that the Defendants should be equitably estopped from claiming that the Plaintiff failed to file a timely Notice of Claim. Specifically, Plaintiff argues that the Defendants provided the Plaintiff with a "false sense of security in relation to Plaintiff's claim" and that Plaintiff relied on Defendants's representations to his detriment.

"In order to establish equitable estoppel "a party must prove that it relied upon another's actions, its reliance was justifiable, and that, in consequence of such reliance, it prejudicially changed its position." (*Flushing Unique Homes, LLC v. Brooklyn Federal Sav. Bank*, 100 A.D.3d 956, 958 [2nd Dept 2012] citing *Town of Hempstead v. Incorporated Village of Freeport*, 15 A.D.3d 567 [2nd Dept 2005].) The Appellate Division, Second Department in *Luka v New York City Tr. Auth.* concluded, in a case analogous to the within action, that the doctrine of equitable estoppel applies only "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice." (*Luka v New York City Tr. Auth.*, 100 AD3d 323, 325 [2nd Dept 1984].) However, the court in *Luka* further concluded that it is a "doctrine of limited application and does not diminish the vitality of the rule that the doctrine of estoppel is not applicable to agencies of the State acting in their governmental capacity." (*Id* at 325.) Furthermore, as in *Luka*, the Plaintiff was put on notice,

by the letter from the Transit authority on May 17, 2012, that the subject bus was not owned by the Transit Authority. Accordingly, the application of equitable estoppel is not appropriate in the within action.

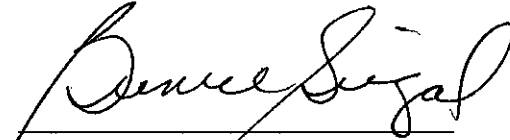
Plaintiff's remaining contentions are without merit.

Conclusion

For the reasons set forth above, Defendant's motion to dismiss pursuant to Public Authorities Law 1276(1) and (2) is granted and the complaint is dismissed and Plaintiff's cross-motion for an order pursuant to CPLR 2215, to amend the notice of claim, *Nunc Pro Tunc* pursuant to General Municipal Law 50-e(6) or to file a late notice of claim *Nunc Pro Tunc* pursuant to GML 50-e(6) is denied.

Dated:

March 5, 2014



Bernice D. Siegal, J. S. C.