Pierre v State of New York
2014 NY Slip Op 34064(U)
February 10, 2014
Court of Claims
Docket Number: Claim No. 123053-A
Judge: Stephen J. Mignano
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PIERRE v. THE STATE OF NEW YORK, # 2013-029-039, Claim No. 123053-A, Motion No. M-83896

Synopsis

Late filing motion granted in pro se claim seeking property damage to car from pothole. DOT Small Claim form attached to motion papers was adequate as proposed claim. Analysis of proposed claim based on standards applicable to timely filed claims is unwarranted and improper.

Case information

UID:	2013-029-039
Claimant(s):	CLAUDE PIERRE
Claimant short name:	PIERRE
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	123053-A
Motion number(s):	M-83896
Cross-motion number(s):	
Judge:	STEPHEN J. MIGNANO
Claimant's attorney:	CLAUDE PIERRE, pro se
Defendant's attorney:	ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL By Terrance K. DeRosa, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	February 10, 2014
City:	White Plains
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

Claimant moves for permission to file a late claim seeking damages of $1,472.36, representing the repair costs after his Mercedes Benz came into contact with potholes on the Saw Mill River Parkway on October 14, 2012 at about noon. Defendant opposes the motion, contending that the court lacks jurisdiction over the motion because claimant failed to submit a proposed claim, that the claim lacks merit and that defendant lacked timely notice of and the opportunity to investigate claimant's allegations and that it would therefore suffer substantial prejudice should the motion is granted. Review of the submitted papers reveals that there is not a semblance of merit to any of defendant's contentions - either as to the applicable law or as to the facts that transpired here - and that denial of the motion would be an abuse of the discretion that the law vests in this court.

Claimant alleges that at noon on the date in question, as he drove southbound on the parkway near Exit 37 in Mount Kisco, his vehicle struck a large pothole, he heard two loud bangs, exited the parkway and found his two left tires and wheels destroyed. After making the necessary repairs, he filed a claim with defendant's Department of Transportation, using their Small Claim Form, and including the Westchester County Police report, photographs of the pothole and the damage, and the repair bill.

In a letter dated February 19, 2013 from Paul Degen, Claims Engineer with DOT's Office of Legal Affairs, the claim was denied. Mr. Degen noted that the claim was received on November 20, 2012, a month after the incident and advised claimant that his claim could not be approved because the law requires notice of a dangerous condition and a failure to correct it in a reasonable time before the State can be held liable, and alleged that their investigation disclosed no basis for such a conclusion:

"In connection with our investigation of the facts of your claim, we have consulted with our field personnel [who] have informed us that this section of highway is monitored on a regular basis . . . . A review of the factual situation of your claim fails to disclose the existence of any such notice or conduct." (1)

Claimant did not accept the denial of his claim and availed himself of the department's appeal process, as reflected in the June 5, 2013 letter from Keith D. Martin, Associate Attorney in the department's Office of Legal Services:

" Our *de novo* review on appeal reveals that the Department indeed did have notice of reappearing potholes in the location of your accident. . . . The Department records which you procured via FOIL (FR8-13-003104) confirm that . . . our crews made pothole repairs at the location of your accident on [August 2, September 27, October 12, and October 14, 2012, the date of claimant's accident]. . . . In your case, the Department had prior notice, regularly made repairs to the bridge and in fact took corrective steps 2 days before your accident and again on the date of your accident."

Mr. Martin advised claimant that it was his office's determination that there was no basis for liability and again denied the claim. The within motion ensued.

Although a claim seeking damages for property must be served and filed within 90 days of accrual, which was not done here, Court of Claims Act section 10(6) provides that the court may in its discretion grant permission to interpose a late claim after consideration of all appropriate factors, including whether claimant's delay was excusable, whether defendant had timely notice of and the opportunity to investigate the pertinent allegations, whether defendant would suffer substantial prejudice should the motion be granted, whether the claim has the appearance of merit and whether claimant has an alternate remedy. The facts before the court demonstrate that all six factors weigh strongly in favor of granting the motion and that there is no merit to the various contentions set forth by defendant in opposition.

Defendant initially contends that the court lacks jurisdiction over the motion because claimant failed to submit a "proposed claim." The argument is both legally and factually incorrect. The only thing that is required for the court to have jurisdiction over a motion seeking permission to late file is that motion papers seeking such relief are served by regular mail on the Attorney General, counsel for the potential defendant, notwithstanding that there is no pending claim and no appearance by anyone and that service by regular mail does not confer jurisdiction in a Court of Claims action (*Sciarabba v State of New York*, 152 AD2d 229). If the motion is successful, the claim must then be served in manner prescribed by statute, thus conferring jurisdiction over the claim.

In addition to requiring that the application be made by motion, the statute requires that "the claim proposed to be filed, containing all of the information set forth in section eleven of this act, shall accompany such application." While this requirement is most often met by a claimant submitting a document called a "Proposed Claim" and attaching it as an exhibit to the motion papers, such is not always the case; e.g., where a claimant makes a late filing application in response to a contention that a filed claim is untimely, the filed claim is routinely addressed as if the previously-filed, dismissed, claim was submitted as a "proposed claim" *(Nunez v State of New York,* Ct Cl, Mignano, J., UID No. 2011-029-056 (2) *; see also Doe v State of New York* (Ct Cl, Mignano, J., UID No. 2006-029-608). The rationale of such holdings is that even though the "proposed claim" did not accompany the application, it is clear to everyone exactly what the "claim proposed to be filed" is.

In any event, claimant in this case did submit a proposed claim, in the form of the completed DOT Small Claim Form, which, although it does not contain a caption referencing the Court of Claims, contains all of the information the Court of Claims Act section 11(b) requires to be in a claim: The time when and place where the claim accrued, the nature of the claim, the items of damage and the amount demanded. (3) Notwithstanding citations to irrelevant cases where the language of a particular timely-filed claim was not set forth with the specificity section 11(b) requires, this document, which claimant clearly intended as the proposed claim, contains more than sufficient information to comply with the statute; i.e., it contains sufficient information so that if it had

been timely served and the issue had been whether it provided sufficient detail to allow for a timely investigation, which it is not, it would clearly have passed the test. [(4)]

Turning to the statutory factors, the reason for claimant's delay - that he relied on DOT's procedure to provide a good faith evaluation of his claim - may appear silly given hindsight's view of what happened in this case, but the court cannot say that such reliance is not reasonable and finds claimant's short delay in this case excusable.

The notice, opportunity to investigate and lack of substantial prejudice factors all weigh heavily in claimant's failure, since it is undisputed that he provided defendant with actual, detailed notice pursuant to its procedures and it is also undisputed that defendant, after receiving such notice, conducted a full investigation. Defendant's contentions to the contrary, citing decisions in cases where the defendant did not have notice of the facts, in total contrast to the facts here, are mystifying.

Claimant has shown substantially more than the required appearance of merit (*Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1), even without reaching defendant's attempt to conceal crucial facts from claimant. He has no alternate remedy, other than the DOT claim procedure which turned out not to be a viable route, in view of the reception that his submissions received.

Accordingly, the motion is granted. Since claimant has already filed his claim, paid a filing fee and received a claim number, there is no reason for him to start over. The filed Claim No. 123053-A is adequate, is verified and contains an affidavit of service by certified mail, return receipt requested. Defendant has not answered the claim, presumably unintentionally, arising from confusion between the pending motion and the claim. The court sua sponte relieves defendant of its default in Claim No. 123053-A, grants claimant relief pursuant to section 10(6) and directs that - should defendant desire to continue to attempt to defend this claim - it may serve and file its answer within 40 days of the date a copy of this decision and order is served on the Attorney General by the Clerk of the Court.

February 10, 2014

White Plains, New York

STEPHEN J. MIGNANO

Judge of the Court of Claims

Papers considered:

Notice of Motion, Affidavit and Exhibits

Affirmation in Opposition and Exhibit

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1. Unnumbered exhibit to the Notice of Motion.

2. *Nunez*: "Accepting defendant's position - and thereby denying the motion and engendering a further motion, identical to this one with the exception of the word "proposed" typed onto an additional copy of the claim - is not required by statute or any controlling case law and would serve no purpose whatsoever except to elevate form over substance to a degree not heretofore seen in Court of Claims jurisprudence."

3. That claimant intended this document as the proposed claim is clear from the fact that in addition to filing this motion, he filed the identical document as a claim. Claim No. 123053-A was filed on August 8, 2013 and originally assigned to Judge Scuccimarra, who has provided his file to this court for consideration on this motion.

4. The purpose of a claim, and in particular the short notice requirements of the Court of Claims Act is "to enable the State . . . to investigate the claim[s] promptly and to ascertain its liability under the circumstances," which is the guiding principle informing section 11 (b)" (*Lepkowski v State of New York*, 1 NY3d 201, 207 quoting *Heisler v State of New York*, 78 AD2d 767, 767 [4th Dept 1980]). A predicate for late filing relief is that the claimant did NOT serve a claim affording the timely opportunity to investigate and the inquiry is whether, notwithstanding that failure to provide timely notice via a claim containing adequate information, defendant acquired knowledge of the relevant facts otherwise so that the claim should be allowed to proceed. When a claim is analyzed against section 11(b), consideration of extraneous material is forbidden. In contrast, on a late filing motion, all relevant

information - affidavits, exhibits - is considered (*see Mamedova v City Univ. of N.Y.*, 13 Misc 2d 1211[A]). Analysis of the contents of a proposed claim on a late filing motion, utilizing the standards that apply to analysis of timely-filed claims - which are aimed at ascertaining whether the document provided sufficient timely notice to investigate - as if the proposed claim, which at this point is merely an exhibit, was a jurisdiction-conferring document - is senseless.

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