

Saldana v City of New York
2015 NY Slip Op 31828(U)
March 16, 2015
Supreme Court, Bronx County
Docket Number: 26099/2002
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

CYNTHIA SALDANA and IAN FRANK.

Plaintiffs,

Index No. 26099/2002
DECISION AND ORDER

-against-

THE CITY OF NEW YORK,
Defendant.

HON. SHARON A. M. AARONS, J.S.C.:

This action seeking damages for an allegedly illegal arrest has been assigned to this Court for trial. The genesis of this action was the execution of a “no knock” warrant on July 3, 2001, at the apartment in which both plaintiffs then resided, together with their children. Initially, the plaintiffs sought recovery for the July 3, 2001 incident, as well as an earlier incident on June 26, 2001. It is now conceded by the plaintiffs that the defendant City of New York (City) had no involvement in the alleged June 26, 2001 incident.

The parties, at the initial trial conference, reported that the issue of service of the notice of claim by plaintiff Cynthia Saldana had been the subject of a prior motion by the City for summary judgment to dismiss her claim for failure to serve a notice of claim. The motion was denied based on the existence of issues of fact. (Order dated June 15, 2012 [Hon. Alison Y. Tuitt, J.].) The City contends that three notices of claim were filed – i.e., two by plaintiff Ian Frank relating to the June 26 and July 3, 2001 incidents, and one by plaintiff Cynthia Saldana relating only to the June 26, 2001 incident. As the issue of service of an alleged notice of claim by plaintiff Cynthia Saldana relating to the July 3 incident remained to be tried, the parties requested that the Court conduct a hearing and

determine the issue of service prior to the selection of the jury.¹

A hearing on the aforementioned issue was held on March 13, 2015. Plaintiff Cynthia Saldana testified, and the City called one witness, an employee of the Comptroller's Office. The hearing testimony was as follows:

The plaintiff testified² that following the execution of the search warrant, she located an attorney, who advised her that he would not represent her unless the criminal charges were dismissed. He did advise her that she was required to file a notice of claim, and that it had to be filed by September 26, 2001. On his advice, she and the co-plaintiff went to a "city agency" (she did not provide the name of the agency), obtained the forms, filled them out, and had them notarized. They then filed the forms on September 26, 2001. She testified that they filed four notices of claim, one for each plaintiff with respect to the June 26 and July 3 events.

The plaintiff entered into evidence copies of three notice of claim forms date stamped on September 26, 2001. She testified that with respect to her notice of claim for the July 3 event (of which she had no copy), she had alleged that the police officers raided her apartment, falsely arrested her, illegally strip searched her, and violated her rights. She admittedly had no written evidence that she had filed a notice of claim for the July 3 incident, and she had no recollection if the city agency had supplied her with stamped copies of the filed notices of claim.

¹There is, consequently, no issue as to the service of a notice of claim on behalf of plaintiff Ian Frank for the July 3, 2001 incident.

²Although plaintiff did not testify as to the underlying events, it is undisputed that as a result of the execution of a search warrant at their residence, plaintiff Cynthia Saldana and co-plaintiff Ian Frank were arrested and charged with various crimes.

The defendant called as its sole witness Michael Aaronson, the Director of Torts in the New York City Comptroller's Office. He testified that as of September 26, 2001, the only means of filing a notice of claim on the City of New York were by mail, or in person at 1 Center Street, in New York County. A claimant filing in person would arrive at a large window on the 12th floor (the Central Image Facility) where a claimant could physically submit a notice of claim. The clerk would either stamp a copy of the notice of claim, or if there were no copies that were submitted, a xerox or photostatic copy of the first page of the notice of claim would be stamped and returned to the person filing the notice of claim.

The person accepting the documents would then prepare the document for scanning (i.e., remove staples, fix tears, etc.). Notices of claim would be "packaged in groups" of 10 and scanned into the Comptroller's OASIS computer system.³ Each physical group or "batch" of ten notices of claim would be placed in a box and, after thirty days, sent to storage.

Mr. Aaronson described his search in both the Comptroller's electronic files, as well as the physical files, both of which failed to uncover any notice of claim filed by Cynthia Saldana for the July 3, 2001 incident. He performed an exhaustive search, both electronically and manually, in 2011.⁴

Initially, he searched for and examined every notice of claim that related to an occurrence

³The witness testified that no one could erase any document that was scanned into the OASIS system. The system employed a technology which he referred to as "WORM technology," meaning "Write One/Read Many."

⁴Shortly before the hearing he retrieved and examined only two particular boxes, in which the batches containing the notices of claim were located.

date of July 3, 2001. He then searched for "Cynthia Saldana," and later, instead of using the whole spelling of "Cynthia Saldana," he performed an electronic search employing just the first two letters of both her last and first names, without any date restrictions. None of these searches uncovered a notice of claim for the date in question.⁵

With respect to the "hard copies," in 2011 he requisitioned the boxes from storage for all notices of claim filed for September 26, 2001, as well as the previous day and the following day. He physically searched the boxes himself, and located only the three notices of claim described above, which were undisputedly filed. He produced the originals of these notices of claim.⁶

The City's witness was asked if any notices of claim were lost due to the tragedy of September 11, 2001. The witness testified that while the office at 1 Centre Street was closed for a two-week period, no documents (physical or electronic) were lost due to the tragedy of September 11, 2001. Further, the City incorporated a notice on its disallowance letter stating that if any person believed that he or she was unable to timely file a notice of claim due to these events, that person could make a motion for leave to serve a late notice of claim. The plaintiff Cynthia Saldana did not move for a late filing.

For each filed notice of claim, the witness testified, an acknowledgment letter is sent to the claimant. The Comptroller's Office located only an acknowledgment letter for the June 26 claim for plaintiff Cynthia Saldana.

⁵Based on his understanding that Ms. Saldana also had used the name of Cynthia Cabrera, he also used the "wild card" search function, looking for claims filed with the first two letters of both her first and last name Cabrera. He found no claim under that name.

⁶On consent, copies were made in the courtroom and marked into evidence.

Mr. Aaronson admitted on cross-examination that on five occasions which he could recall, notices of claim were not located, yet there was acceptable proof submitted by the claimant that the notice of claim had in fact been filed. For example, sheets containing bar codes are physically placed in between separate notices of claim when they are “bundled” into groups of ten, and on rare occasions, the employee could have failed to place the “separation” sheet between two notices of claim, or the scanner had failed to “recognize” that separation sheet, treating two separate notices of claim as one. Moreover, a notice of claim could be placed in an incorrect file.

GML 50-e(3)(a) provides, in part, that, “The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation . . . ” To sustain a cause of action, a plaintiff must both plead and prove timely filing of the notice of claim. (*Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824, 474 N.Y.S.2d 763 [1st Dept. 1984]).

The Court finds that plaintiff Cynthia Saldana has failed to establish that she filed a notice of claim with respect to the July 3 incident. The plaintiff’s cursory explanation that she filed the missing notice of claim, of which she retained no copy, is not convincing. The account she gave of going to the “city agency” lacked any cogent details.⁷ The plaintiff did not testify as to the name of the “city agency,” its location, or the time when she went to deliver the notices of claim. Nor did she

⁷The plaintiff did not explain where she and the co-plaintiff filled out the blank notice of claim forms, or where they located a notary public.

describe the person who accepted the documents for filing (male or female, age, appearance, etc.). In short, the Court was not convinced that plaintiff Saldana had any specific recollection, as she claimed, of having filed the fourth notice of claim relating to her claim for the July 3 incident, as she had no recollection of any of the salient details. Tellingly, as to the contents of her notice of claim as to the July 3 incident, plaintiff testified that she had alleged in her written notice of claim that the police officers had raided her apartment, falsely arrested her, illegally strip searched her, and violated her rights. However, the notice of claim actually filed by co-plaintiff Ian Frank simply states that “police came into my home & beated [sic] me down & violated my rights.” The words “false arrest” do not appear in the notice of claim actually filed by plaintiff Ian Frank. As plaintiff Cynthia Saldana and the co-plaintiff Ian Frank were allegedly acting together in filing the notices of claim, it is not credible that plaintiff Cynthia Saldana’s notice of claim would have contained such a wealth of detail, when co-plaintiff Ian Frank’s lacked any such detail. Moreover, the plaintiff failed to produce written documentation of any kind.

Plaintiff Saldana’s counsel in a post-hearing memorandum contends that as her client was physically present at the Comptroller’s Office on September 26, 2011, there was no reason why she would not have filed a notice of claim – especially as plaintiff’s claim for false arrest on July 3 was “better” than her claims arising out of the June 26 incident. It is difficult to discern how plaintiff Saldana would have known one claim had more merit than another, as no lawyer would represent her until all charges were dismissed. Counsel’s argument is mere speculation, and is not persuasive. Many reasons may explain the failure of plaintiff Saldana to file a claim for July 3, whether inadvertence, or failure to recognize the importance of doing so. It is not necessary for the Court,

however, to engage in speculation as to why plaintiff Saldana failed to file the notice. Notwithstanding her lack of memory as to receiving a stamped copy, plaintiff Saldana failed to call the co-plaintiff Ian Franks, who was present outside the courtroom, to corroborate any of her testimony – including her allegation that he accompanied the co-plaintiff to effectuate the filing.

The Court credits the testimony of the defendant's witness Mr. Aaronson that only three notices of claim were located relating to the two plaintiffs herein. Based on exhaustive electronic searches, as well as physical searches for the date of filing (September 26, 2001), as well as the day before and the day after, provided cogent evidence that the alleged notice of claim was not in fact filed. This testimony was buttressed and supported by the fact that the defendant's records contained a notice of acknowledgment sent to Cynthia Saldana only for the June 26 incident.

The Court rejects any suggestion that this is a rare case in which a notice of claim was filed but not located. The Court does not find the plaintiff's unsupported testimony to be persuasive. Moreover, the fact that three undisputed notices of claim were located both electronically, as well as physically, supports the conclusion that no error was made, but that, to the contrary, only three notices of claim were filed.⁸ Even if the agency had made an error in the filing of the alleged fourth notice of claim, the mistake would have been evident upon plaintiff Saldana's submission of a stamped copy of the notice of claim. In any event, plaintiff could not tell the Court if she had received a stamped copy, and if so, what happened to it – i.e., whether they were lost or destroyed. Plaintiff Cynthia Saldana's recollection is not sufficient to meet her burden under the circumstances

⁸Notably, the notices of claim produced at the hearing were supplied by defendant City. Plaintiff was supplied copies by the City located during its exhaustive search.


presented.

In her memorandum of law, plaintiff Saldana's counsel suggests that the missing notice of claim may have been lost due to the events of September 11, 2001. However, the credible testimony demonstrated otherwise; in fact, Mr. Aaronson physically examined all of the notices of claim filed for the three-day period including September 26, 2001. The plaintiff argues that the City should be "estopped" from denying the existence of the missing notice of claim, but it is clear that estoppel does not exist when the party claiming it has not changed its position or acted in reliance. (*Matter of Emporium Mgt. Corp. v. City of New York*, 121 A.D.3d 981, 995 N.Y.S.2d 127 [2d Dept. 2014] [to establish estoppel, the misconduct of the public agency must have induced justifiable reliance by a party who then changed his position to his detriment]; *Singleton v. City of New York*, 55 A.D.3d 447, 865 N.Y.S.2d 600 [1st Dept. 2008] [defendants were not required to raise the late filing as an affirmative defense, nor were they estopped from seeking dismissal of the complaint on this ground]).

Accordingly, the claims of plaintiff Cynthia Saldana are dismissed for failure to serve a notice of claim. It is hereby

ORDERED that all claims by plaintiff Cynthia Saldana are hereby dismissed, with prejudice, and the Clerk is directed to enter judgment dismissing all claims by said plaintiff.

Dated: March 16, 2015



SHARON A. M. AARONS, J.S.C.