Facey v City of New York

2015 NY Slip Op 32723(U)

May 6, 2015

Supreme Court, Queens County

Docket Number: 15501/14

Judge: Phyllis Orlikoff Flug

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ORIGINAL

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, Justice   IA Part 9

JUNIEPA FACEY, Individually and as Administratrix of the Estate of RAYMOND FACEY and on behalf of distributees therein, Plaintiff, -against- CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY EMERGENCY MEDICAL SERVICES, NEW YORK STATE PAROLE BOARD, NASSAU COUNTY, NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY EMERGENCY MEDICAL SERVICES, NASSAU UNIVERSITY MEDICAL CENTER, CLARENCE HUDSON, ESTATE OF ARTIE LOPEZ, POLICE OFFICER OMAR CASTILLO, POLICE OFFICER MICHAEL MIEZIANKA, INSPECTOR CORTESIS, LIEUTENANT JOSEPH SCIRE, "JOHN DOE" 1-100, Defendants.	Index Number..15501/14 Motion Date...1/13/15 Motion Cal. Number........68 Sequence No...1 FILED MAY 21 2015 COUNTY CLERK QUEENS COUNTY

The following papers numbered 1 to 9 read on this motion

Notice of Motion	1 - 2
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Plaintiff, Juniepa Facey, moves *inter alia* for leave to serve a late notice of claim on respondents. Defendant, New York State Department of Corrections and Community Supervision s/h/a New York

State Parole Board (hereinafter "DCCS"), cross-moves *inter alia* to dismiss plaintiff's compliant as asserted against it. Defendants, City of New York (hereinafter "City"), New York City Police Department (hereinafter "NYCPD") and New York City Emergency Medical Services (hereinafter "EMS"), separately cross-move *inter alia* to dismiss plaintiff's complaint and all cross-claims asserted against them.

This is an action to recover damages for the alleged wrongful death of Raymond Facey on October 23, 2012 when he was shot by non-party Darrell Fuller during the course of a police chase by defendant officers near 241st Street and Jamaica Avenue, in the County of Queens, City and State of New York.

A Notice of Claim must be served within ninety days after the claim arises (GML 50-e[1][a]). A court may grant the claimant leave to serve a late Notice of Claim if leave is sought within the time limited for the commencement of the action (See Pierson v. City of New York, 56 N.Y.2d 950 [1982]).

"In exercising its discretion to grant leave to serve a late notice of claim, the court must consider various factors, including whether (1) the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim, (2) the claimant was an infant, or mentally incapacitated, (3) the public corporation [or its attorney or its insurance carrier] acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (4) the delay would substantially prejudice the public corporation in defending on the merits" (Keyes v. City of New York, 89 A.D.3d 1086 [2d Dept. 2011] (citing GML 50-e[5]; Iacone v. Town of Hempstead, 82 A.D.3d 888 [2d Dept. 2011]; Barnes v. New York City Health & Hosps. Corp., 69 A.D.3d 934 [2d Dept. 2010]; Chambers v. Nassau County Health Care Corp., 50 A.D.3d 1134, 1135 [2d Dept. 2008])).

As an initial matter, plaintiff's ignorance of the notice of claim requirement does not constitute a reasonable excuse for the delay (See Pico v. City of New York, 8 A.D.3d 287, 288 [2d Dept. 2004] (citing Gilliam v. City of New York, 250 A.D.2d 680 [2d Dept. 1998]; Lamper v. City of New York, 215 A.D.2d 484 [2d Dept. 1995])). Plaintiff's late retention of counsel is also not a reasonable excuse for the delay (See Bollerman v. New York City Sch. Construction Auth., 272 A.D.2d 469, 470 [2d Dept. 1998]; Ealey v. City of New York, 204 A.D.2d 720, 720-21 [2d Dept. 1994]).

Contrary to defendant's contentions, however, plaintiff's claim that she was more concerned with the death of her husband and the criminal trial relating to that death to timely commence this action does constitute a reasonable excuse (See Staley v. Piper, 285 A.D.2d 601, 602 [2d Dept. 2001]).

Nevertheless, plaintiff has failed to demonstrate that defendants had actual knowledge of the essential facts constituting the claim within the requisite time period.

Contrary to plaintiff's contentions, the mere fact that defendants' employees promptly responded to the scene of the incident is insufficient to demonstrate that defendants had actual knowledge of the essential facts constituting the claim (See Aliberti v. City of Yonkers, 302 A.D.2d 456 [2d Dept. 2002]; Morrison v. New York City Health & Hosps. Corp., 244 A.D.2d 487, 488 [2d Dept. 1997]). This is particularly true in light of the fact that the shooter was not employed by defendants (Cf. Bakioglu v. Tornabene, 117 A.D.3d 658, 659 [2d Dept. 2014]; Vasquez v. City of Newburgh, 35 A.D.3d 621, 623 [2d Dept. 2006]).

In addition, neither the media reports regarding the subject incident, nor the fact that the incident was investigated for purposes of the criminal action against the non-party shooter suffices to provide notice of the claim (See Traylor v. Comeswogue Sch. Dist., 265 A.D.2d 332, 333 [2d Dept. 1999]; see also Lenoir v. New York City Hous. Auth., 240 A.D.2d 497, 498 [2d Dept. 1997]

It is well settled that knowledge of the alleged wrong is insufficient; what is required is knowledge of facts that underlie the legal theory or theories on which liability may be predicated (See Catuosco v. City of New York, 62 A.D.3d 995, 996 [2d Dept. 2009]; Felice v. Eastport/South Manor Cent. Sch. Dist., 50 A.D.3d 138, 148 [2d Dpt. 2008]).

Plaintiff fails to submit any evidence tending to show that defendants not only knew that the decedent had been shot by the non-party but were also put on notice that they would be charged with responsibility for the shooting (See Traylor, *supra*, at 333).

To the extent that plaintiff's claim that defendants would not be prejudiced by the delay relies upon incorrect assumption that defendants had actual knowledge, it is insufficient to satisfy their burden (See Lyerly v. City of New York, 283 A.D.2d 647, 648 [2d Dept. 2001]). The passage of time has hampered defendant's ability to find witnesses and conduct a timely investigation into the claims (see Harris v. City of New York, 297 A.D.2d 473, 474 [2d Dept. 2002]) and the absence of prejudice is not determinative in any event (See Cali v. County of Suffolk, 132 A.D.2d 555, 556 [2d Dept. 1987]).

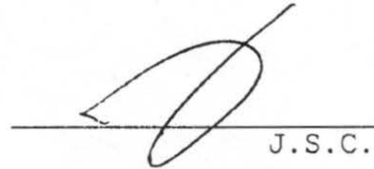
Accordingly, plaintiff's motion for leave to serve a late notice of claim on respondents is denied, in its entirety.

Defendant DCCS's cross-motion to dismiss is granted, without opposition, and plaintiff's complaint is dismissed as asserted

against New York State Department of Corrections and Community Supervision s/h/a New York State Parole Board, only.

Defendant City's cross-motion is granted, without opposition, and plaintiff's complaint is dismissed as asserted against defendants, City of New York, New York City Police Department and New York City Emergency Medical Services, only.

May 6, 2015



J.S.C.

HON. PHYLLIS ORLIKOFF FLUG

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