| **Beal v State of New York** |
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| 2015 NY Slip Op 32994(U) |
| January 5, 2015 |
| Court of Claims |
| Docket Number: Claim No. XXXXX |
| Judge: Catherine C. Schaewe |
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<& /claims/inclusions/header.htm &>
BEAL v. THE STATE OF NEW YORK, # 2015-044-500, Claim No. None, Motion No. M-85706

## Synopsis

Court grants claimant's request for permission to late file claim.

## Case information

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| UID: | 2015-044-500 |
| Claimant(s): | RUSSELL BEAL |
| Claimant short name: | BEAL |
| Footnote (claimant name) : | |
| Defendant(s): | THE STATE OF NEW YORK |
| Footnote (defendant name) : | The Court has sua sponte amended the caption to reflect the State of New York as the sole proper defendant. |
| Third-party claimant(s): | |
| Third-party defendant(s): | |
| Claim number(s): | None |
| Motion number(s): | M-85706 |
| Cross-motion number(s): | |
| Judge: | CATHERINE C. SCHAEWE |
| Claimant's attorney: | RUSSELL BEAL, pro se |
| Defendant's attorney: | HON. ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL<br>BY: Roberto Barbosa, Assistant Attorney General |
| Third-party defendant's attorney: | |
| Signature date: | January 5, 2015 |
| City: | Binghamton |
| Comments: | |
| Official citation: | |
| Appellate results: | |
| See also (multicaptioned case) | |

## Decision

Claimant, a self-represented litigant, again moves for permission to file and serve a late claim to recover for damage to his automobile allegedly incurred when he struck a pothole while traveling westbound on State Route 17 (Route 17).[(2)] Defendant State of New York (defendant) opposes the motion.

A motion seeking permission to file and serve a late claim must be brought within the statute of limitations period attributable to the underlying cause of action (Court of Claims Act § 10 [6]). The proposed claim alleges that claimant suffered property damage to his vehicle while traveling on a State highway on April 21, 2013. The statute of limitations for a negligence cause of action resulting in property damage is three years from the date of accrual (CPLR 214 [4]). Accordingly, this motion mailed on September 14, 2014 is timely (*Matter of Unigard Ins. Group v State of New York,* 286 AD2d 58 [2d Dept 2001]).

Initially, and as defendant correctly notes, claimant has not provided an affidavit in support of this motion as required by both CPLR 2214 and the Uniform Rules for the Court of Claims [22 NYCRR] § 206.8 (a) (*see* 4 Weinstein-Korn-Miller, NY Civ Prac ¶ 2214.02; *see also Pettus v State of New York,* Ct Cl, Mar. 26, 2007,
[* 1]

Schaewe, J., Claim No. 112504, Motion No. M-72699). Although claimant's motion could be denied solely on this procedural basis, the Court will not deny the motion in light of the information contained in both the notice of motion, the verified proposed claim, and the one-page attachment to the proposed claim.

The Court now turns to a consideration of the merits of the motion itself. The factors that the Court must consider under Court of Claims Act § 10 (6) in determining a motion to permit a late filing of a claim are whether:

1) the delay in filing the claim was excusable;

2) defendant had notice of the essential facts constituting the claim;

3) defendant had an opportunity to investigate the circumstances underlying the claim;

4) the claim appears to be meritorious;

5) the failure to file or serve upon the attorney general a timely claim or to

serve upon the attorney general a notice of intention resulted in substantial prejudice to defendant; and

6) claimant has any other available remedy.

Claimant asserts that the delay in filing a claim was justified because the Department of Transportation (DOT) did not decide claimant's administrative claim until after expiration of the 90-day period in which he could serve a notice of intention or file and serve a claim pursuant to Court of Claims Act § 10 (3). Claimant's ignorance of the requirements of the Court of Claims Act and the fact that his administrative claim was still pending are not adequate excuses for his delay in timely serving a notice of intention or timely filing and serving a claim (*see Matter of Sandlin v State of New York,* 294 AD2d 723 [3d Dept 2002], *lv dismissed* 99 NY2d 589 [2003]; *Plate v State of New York,* 92 Misc 2d 1033 [Ct Cl 1978]).[(3)] Accordingly, this factor weighs against claimant.

The three factors of notice of the essential facts, an opportunity to investigate and the lack of substantial prejudice are frequently analyzed together since they involve similar considerations. Claimant does not directly address these three factors, but asserts that he had filed an administrative claim with DOT which does pertain to these issues.[(4)] Defendant argues that because it did not have notice of the underlying facts, it has been precluded from conducting an investigation and has thereby suffered substantial prejudice.

In his administrative claim, claimant states that the incident occurred on April 21, 2013[(5)] as he was traveling west toward Binghamton on his way to Elmira. Claimant asserts that he struck an enormous pothole and the right front tire went flat, causing him to temporarily lose control. Claimant states that he was able to move to the side of the road, stop, and contact a towing service which changed the tire. He drove approximately six miles farther and realized that there was a problem with the steering. He again pulled over and stopped. At that time, he discovered that his left front tire was flat. He contacted the same towing company and had the second tire changed. Claimant notes two locations for the incident, one as "North of Binghamton RT 17 ext 75,"[(6)] 0.5 miles from the Exit 75 highway sign, and the second as "Gas Station on 17 West Apalachin."[(7)]

The DOT conducted an investigation in response to the administrative claim, and noted that the particular "section of highway is monitored on a regular basis and potholes are repaired as soon as [DOT] become[s] aware of their existence."[(8)] Counsel for DOT denied the administrative claim, citing a lack of notice, and claimant's subsequent appeal and request for reconsideration were also denied.[(9)]

Defendant has also submitted the affidavit of Jon Van Vleet, who was Assistant Resident Engineer at DOT Broome County Residency at the time of the incident. Van Vleet states that he investigated claimant's administrative claim and determined that Broome County Residency had not been notified of the existence of the pothole. Van Vleet also directed DOT staff to the location of the alleged incident, which was apparently ½ mile from Exit 75 on Route 17 westbound. He states that the staff did not find any potholes in that vicinity. Van Vleet further notes that there are more than six miles between Exit 75 where claimant's right front tire was replaced and Exit 66 (Apalachin) where the left front tire was replaced. As a result, Van Vleet concludes that claimant's accident could not have happened near Exit 75.[(10)]

[* 2]

Contrary to defendant's contention, it is clear that defendant had notice of the essential facts and in fact conducted an investigation. Moreover, the Court can discern no apparent prejudice to defendant. Thus, these three factors weigh in favor of claimant.

Another factor to be considered is whether claimant has any other available remedy. Claimant seeks to recover for damages incurred as a result of defendant's allegedly negligent maintenance of a State highway. The Court finds that the Court of Claims is the proper forum for this action against the State. Accordingly, this factor weighs in favor of claimant.

The issue of whether the proposed claim appears meritorious is the most crucial component in determining a motion under Court of Claims Act § 10 (6), since it would be futile to permit a meritless claim to proceed (*Matter of Santana v New York State Thruway Auth.,*

92 Misc 2d 1, 10 [Ct Cl 1977]). In order to establish a meritorious claim, a claimant must demonstrate that the proposed claim is not patently groundless, frivolous, or legally defective, and that there is reasonable cause to believe that a valid claim exists (*id.* at 11). There is a heavier burden on a party moving for permission to file a late claim than on a claimant who has complied with the provisions of the Court of Claims Act (*id.* at 11-12; *see also Nyberg v State of New York,* 154 Misc 2d 199, 202-203 [Ct Cl 1992]).

The State clearly has a nondelegable duty to maintain its roadways in a reasonably safe condition (*Tomassi v Town of Union,* 46 NY2d 91, 97 [1978]). However, it must be noted that the State is not an insurer of the safety of the roads, and the occurrence of an accident thereon does not automatically impose liability on the State (*id.*). Liability will generally not attach unless the State had either actual or constructive notice of a dangerous condition and then failed to take reasonable measures to correct the condition (*see Harris v Village of E. Hills,* 41 NY2d 446, 450 [1977]; *D'Alessio v State of New York,* 147 AD2d 791 [3d Dept 1989]; *Brooks v New York State Thruway Auth.,* 73 AD2d 767 [3d Dept 1979], *affd* 51 NY2d 892 [1980]; *Rinaldi v State of New York,* 49 AD2d 361, 363 [3d Dept 1975]).

Claimant alleges that on April 21, 2013 he was traveling west on Route 17 towards Binghamton (and thereafter to his home). At approximately 3:00 a.m., he struck an "enormous pot hole [sic]."[(11)] He heard the front passenger tire flapping loudly and he lost control of the car. Claimant alleges that he was able to pull over on the side of the highway and assess the situation. He saw that the side of the tire was ripped and the rim was bent. He contacted his insurance road service which arranged for a towing company to change the tire. He alleges that he drove approximately six miles farther on Route 17 and noticed that the steering was pulling toward the right. Claimant states that he again pulled to the side of the road and inspected the driver's side of the vehicle and discovered that front tire was also ripped. He asserts that the same towing company returned and changed that tire as well. Claimant states that the damage to his car consisted of two bent rims, two torn tires and some body damage.[(12)] In his administrative claim, claimant also alleged that "the car hit so hard that the tire had hit [into] the body of the car," bending the wheel well and scraping the paint off of the right side.

The Court - deeming the facts alleged as true for purposes of this motion as it must (*see Jolley v State of New York*, 106 Misc 2d 550, 551-552 [Ct Cl 1980]) - finds that claimant has sufficiently alleged the existence of a dangerous condition, i.e. a pothole large enough to cause significant damage to claimant's automobile. Further, the more specific allegation contained in claimant's administrative claim concerning the damage to the wheel well supports an inference that the pothole was of sufficient depth and size that it may have existed long enough that it could or should have been discovered during routine inspections. Accordingly, the Court finds that claimant has established at least the initial appearance of merit and this factor also weighs in his favor.[(13)]

Five of the six statutory factors, including the crucial factor of merit, weigh in favor of claimant. Accordingly, claimant's motion for late claim relief is granted. Claimant shall file a claim containing the information required by Court of Claims Act § 11 (b), including the information in the proposed claim and attachment as well as that contained in his administrative claim. Claimant shall file said claim and serve a copy of it upon the Attorney General within forty (40) days from the date of filing of this Decision and Order in the Office of the Clerk of the Court. The service and filing of the claim shall be pursuant to the strict requirements of the Court of Claims Act.

January 5, 2015

Binghamton, New York

CATHERINE C. SCHAEWE

[* 3]

Judge of the Court of Claims

The following papers were read on claimant's motion:

1) Notice of Motion filed on September 15, 2014 and attachments.

2) Affirmation in Opposition of Roberto Barbosa, AAG, dated November 10, 2014, and attached exhibits.

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2. The Court previously dismissed as untimely claimant's Claim No. 123538 filed on November 21, 2013, which pertained to the same incident (*Beal v State of New York,* Ct Cl, Mar. 10, 2014, Schaewe, J., Claim No. 123538, Motion No. M-84412). Thereafter, claimant's first motion for late claim relief was denied, without prejudice (*Beal v State of New York,* Ct Cl, July 31, 2014, Schaewe, J., Claim No. None, Motion No. M-85072).

3. Notwithstanding the statement contained in the DOT's determination on appeal that claimant should "consider [his] administrative remedies [to be] exhausted" (Claimant's Notice of Motion filed September 15, 2014, at 5), claimant was clearly not required to exhaust any administrative remedies before filing this negligence claim to recover for property damage against the State (*compare* Court of Claims Act § 10 [3] *with* Court of Claims Act § 10 [9]).

4. Although claimant has not submitted a copy of his administrative claim, defendant has attached a copy of the administrative claim, as well as its determination and appeals, as Exhibits B1-G to its opposition papers.

5. Claimant actually stated that the date of the incident was "4/21/03." However, there does not appear to be any dispute that the incident took place in 2013, particularly since the vehicle involved was a 2004 BMW (Affirmation of Assistant Attorney General [AAG] Roberto Barbosa, dated Nov. 10, 2014, in Opposition to Motion, Exhibit B1 at 1).

6. *id.*

7. *Id.*

8. *Id.*, Exhibit C

9. *Id.*, Exhibits C-F.

10. The Court notes that it is equally possible that claimant misjudged the distance between the two stops.

11. Proposed Claim, ¶ 2.

12. Claimant alleges that he had to have a wheel alignment as well.

13. In light of claimant's allegation of the existence of an enormous pothole, Van Vleet's statement that his DOT staff did not find any pothole in the vicinity of Exit 75 merely creates an issue of credibility, rather than conclusively establishing the lack of merit.

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