Matter of Chestnut v New York City Hous. Auth.
2016 NY Slip Op 31843(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 154527/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In The Matter of the Application of
JANEE CHESTNUT,

Index No. 154527/2016
Motion Seq: 001

Petitioner,

-against-

DECISION & ORDER
HON. ARLENE P. BLUTH

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent,

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Petitioner's petition to serve a late notice of claim against respondent is denied.

This action arises out of petitioner's alleged injuries suffered during an incident that took place on March 1, 2015 at the Ralph J. Rangel Houses (Rangel Houses) located at 159-20 Harlem River Drive, New York, NY. Petitioner claims that she was injured when she fell on an interior staircase leading to the lobby elevator.

Petitioner further claims that a handyman for respondent (NYCHA), Ben Richardson, witnessed the incident and helped her up and into the ambulance and later inspected the alleged dangerous condition. Petitioner argues that because a NYCHA employee had knowledge of the incident, NYCHA would suffer no prejudice from petitioner's late notice of claim.

In opposition, NYCHA claims that petitioner has not satisfied the requirements of General Municipal Law § 50-e(5) because petitioner has not provided an excuse for her delay. NYCHA claims that no staff was on duty at the time of the alleged incident, which purportedly

took place on a Sunday afternoon around 1 p.m. NYCHA claims that the late notice of claim compromises NYCHA's ability to investigate the claim.

In reply, petitioner claims that the absence of a reasonable excuse is not fatal to its application. Petitioner also asserts that NYCHA's failure to present an affidavit from Mr. Richardson compels this Court to grant petitioner's requested relief. Petitioner claims that although Mr. Richardson may not have been working that day, NYCHA failed to demonstrate that he was not present at the location of the accident.

Discussion

A notice of claim must be served within ninety days after the claim arises (General Municipal Law § 50-e [1]). "General Municipal Law § 50-e (5) bestows upon the court the discretion to either grant or deny leave to serve a late notice of claim within certain parameters" (*Nieves v New York Health and Hosps. Corp.*, 34 AD3d 336, 337, 825 NYS2d 40 [1st Dept 2006]). "[T]he presence or absence of any one factor is not determinative" (*id.*). General Municipal Law § 50-e (5) provides that:

> Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the

> public corporation against which the claim should be asserted; if service of the notice of claim is attempted by electronic means pursuant to paragraph (e) of subdivision three of this section, whether the delay in serving the notice of claim was based upon the failure of the computer system of the city or the claimant or the attorney representing the claimant; that such claimant or attorney, as the case may be, submitted evidence or proof as is reasonable showing that (i) the submission of the claim was attempted to be electronically made in a timely manner and would have been completed but for the failure of the computer system utilized by the sender or recipient, and (ii) that upon becoming aware of both the failure of such system and the failure of the city to receive such submission, the claimant or attorney had insufficient time to make such claim within the permitted time period in a manner as otherwise prescribed by law; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

"[T]he lack of a reasonable excuse is not, standing alone, sufficient to deny an application for leave to serve and file a late notice of claim, where . . . defendant's employee witnessed the accident, and where defendant cannot show that it was prejudiced by the delay" (*Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596, 899 NYS2d 232, [1st Dept 2010]).

As an initial matter, petitioner has not stated a reasonable excuse for filing a late notice of claim. Of course, this factor is not enough, standing alone, to justify this Court's denial of petitioner's application.

However, petitioner also failed to demonstrate that NYCHA had actual knowledge of the facts of the alleged incident. Petitioner's claim that Ben Richardson witnessed the accident is contradicted by NYCHA's submission of the affidavit of Jaime Len. The Len affidavit contains a logbook for the date of the alleged accident, which shows that Ben Richardson was not working at the Rangel Houses on March 1, 2015. The Len affidavit also demonstrates that no NYCHA employee was working on site after 1 p.m. because the logbook does not include any notations about overtime; overtime would have been required had an employee worked past 1 p.m. The

Middleton affidavit, submitted by NYCHA, also claims that Ben Richardson did not work on March 1, 2015 because the time sheets, which reflect when an employee swipes in/out, indicate that other employees were working at the Rangel Houses on that date.

Petitioner's claim that working at the Rangel Houses is logically distinct from whether a person was physically present at the Rangel Houses is conceptually correct. Of course, a person could be at a location while not working as an employee. That person could simply be on site and off-duty. However, the Court finds that merely pointing out this distinction is not sufficient to demonstrate that NYCHA acquired *actual knowledge* of the alleged incident.

First, petitioner's papers fail to make any specific allegation about the reason for Mr. Richardson's presence at the alleged accident location. Although it is undisputed that Mr. Richardson was not working for NYCHA at the time of the incident, petitioner does not argue, for example, that Mr. Richardson was off-duty but at the Rangel Houses on the date of the incident or claim that Mr. Richardson was often at the Rangel Houses while not working for NYCHA. Petitioner's reply affirmation is careful to avoid affirmatively stating a reason for Mr. Richardson's presence at the Rangel Houses.

The Court must then reconcile NYCHA's claim that Mr. Richardson was not working with petitioner's assertion that Mr. Richardson was at the Rangel Houses. It would be unfair to permit petitioner leave to serve a late notice of claim where petitioner failed to submit any evidence tending to substantiate her claim that Mr. Richardson was at the accident site. While NYCHA submitted documentary evidence showing that Mr. Richardson was not working at the Rangel Houses, petitioner has not submitted anything, other than the verified petition, to suggest that Mr. Richardson was at the scene of the accident. It is not this Court's role to speculate or

infer from the papers submitted by both parties that Mr. Richardson was at the Rangel Houses and off-duty on the day of the incident.

Second, even if the court were to accept petitioner's argument that Mr. Richardson was at the accident location[1], petitioner did not provide any support for the notion that NYCHA acquired actual knowledge of petitioner's accident. "Actual knowledge of the essential facts underlying the claim means knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the proposed notice of claim" (*Bhargava v City of New York*, 130 AD3d 819, 820, 13 NYS3d 552 [2d Dept 2015] [internal quotations and citation omitted]). Petitioner failed to provide any explanation for how NYCHA would have acquired actual knowledge.[2]

Certainly, if an employee witnesses the events giving rise to a claim, it can help support the argument that a public corporation or entity has actual knowledge (*see Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596, 899 NYS2d 232, [1st Dept 2010]). Here, petitioner failed to submit any evidence to show that Mr. Richardson informed NYCHA about petitioner's alleged accident. Further, petitioner did not establish that Mr. Richardson had an obligation, *as an off-duty employee*, to inform NYCHA of the incident any more than any other eyewitnesses would have had. The Court declines to speculate how, and if, NYCHA acquired actual knowledge of

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[1]For purposes of this section of the Court's analysis, the Court will assume that Mr. Richardson was at the Rangel Houses and off-duty because it is undisputed that Mr. Richardson was not working for NYCHA at the time of the alleged incident. Therefore, if he witnessed the accident, then Mr. Richardson did so while he was off-duty.

[2]In fact, petitioner did not submit any documentation, other than the verified petition, to establish that the accident occurred including *inter alia*, ambulance or emergency room records, incident or police reports, or affidavits from eyewitnesses.

petitioner's alleged trip and fall. Accordingly, the Court finds that petitioner failed to demonstrate that NYCHA acquired actual knowledge of petitioner's purported accident.

NYCHA would also be prejudiced if petitioner were permitted to serve a late notice of claim because NYCHA did not have a chance to timely investigate the alleged incident. "[N]otice is required so that the municipal defendant has an adequate opportunity to timely investigate and defend at a point in time when the facts are still fresh" (*Torres v New York City Hous. Auth.*, 261 AD2d 273, 274, 690 NYS2d 257 [1st Dept 1999]). Here, NYCHA claims that petitioner seeks leave to serve a late notice of claim one year and eighty-seven days after the alleged injury. NYCHA correctly observes that petitioner failed to supply photographs regarding the alleged dangerous condition. Petitioner has also not stated whether repairs have been made to the alleged dangerous condition or even whether the alleged defective step is in the same state as it was on the date of the alleged incident (March 1, 2015). The facts are certainly no longer fresh and NYCHA would not have an adequate opportunity to defend itself or investigate the alleged incident if petitioner were allowed to proceed.

Weighing all the relevant factors, the Court, in its discretion, declines to grant petitioner's request for leave to serve a late notice of claim.

Accordingly, it is hereby

ORDERED that petitioner's to serve a late notice of claim is denied; and it is further

ORDERED that petitioner's petition is dismissed.

This is the Decision and Order of the Court.

Dated: September 30, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.