Naar v City of New York
2016 NY Slip Op 32929(U)
October 4, 2016
Supreme Court, Queens County
Docket Number: 708445/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice — Part 10

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Marie E. Naar,

Petitioner,

- against -

City of New York and New York Fire Department,

Respondents.

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Index Number: 708445/16

Motion Date: 9/15/16

Cal. Number: 121

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this petition for leave to file a late notice of claim.

	Papers Numbered
Order to Show Cause-Petition-Exhibits...............	1-4
Affirmation in Opposition-Exhibit...................	5-7
Reply-Exhibits......................................	8-10

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner for leave to serve a late notice of claim and to deem the late notice of claim heretofore filed as filed nunc pro tunc is denied.

Petitioner allegedly sustained injuries as a result of a motor vehicle accident in which the vehicle she was operating was struck by an FDNY fire engine at the intersection of Jamaica Avenue and 198th Street in Queens County on December 28, 2015. Petitioner alleges that she was traveling on 198th Street approaching Jamaica Avenue when she heard a fire engine approaching at speed behind her. She alleges that she made a left turn onto Jamaica Avenue and the fire truck also made the turn, and that she tried to pull over to the left and the fire engine swerved in an unsuccessful attempt avoid her and struck her vehicle and did not stop.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of

claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]).

Petitioner's counsel annexes a letter addressed to the "FDNY, 9 Metrotech Center, Brooklyn NY 11201" dated January 21, 2016, annexing thereto a copy of the police accident report, informing the FDNY that his office was representing petitioner and that the FDNY should forward the letter to its insurance carrier and have the carrier contact counsel to inform him of its coverage and policy limits. The FDNY responded by letter dated January 27, 2016, informing counsel that his notice of claim was being returned so that he could file it properly, as the FDNY is not authorized to accept or adjust notices of claim and further informing counsel that a notice of claim against the FDNY should be filed with the Office of the Comptroller of the City of New York at the Municipal Building, 1 Centre Street, New York, New York 10007, and also providing the telephone number of the Comptroller's office. Counsel's exhibit demonstrates that he did not annex a notice of claim to his letter but only a copy of the accident report. Apparently, the FDNY interpreted this submission as an attempt by counsel to assert a claim.

On March 18, 2016, counsel mailed a notice of claim by certified mail addressed simply to "City of New York, 1 Center Street, New York, New York 10007", as the photocopy of the postmarked envelope annexed to the petition shows. The USPS tracking information corresponding to the tracking number on the envelope (a print-out of which is also annexed to the petition) indicates the status of the item on March 21, 2016 as undeliverable. The envelope further indicates that it was physically returned by the Post Office to counsel's office on May 16, 2016, marked "return to sender insufficient address".

It is undisputed, and counsel admits, that the notice of claim should have been addressed to the Office of the Comptroller at 1 Centre Street, attention Claims Department, Room 1200. Counsel thereafter mailed the notice of claim again, this time correctly, on May 16, 2016. By letter dated June 1, 2016, the Comptroller's Office apprised counsel that the claim was disallowed because the notice of claim was untimely. Counsel thereafter filed the instant order to show cause for leave to serve a late notice of claim on July 19, 2016.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d

619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to proffer an adequate excuse for her failure to serve a timely notice of claim. Her counsel argues that he relied upon the incomplete address information furnished by the FDNY in sending the notice of claim and also blames the U.S. Postal Service for failing to mail back the notice of claim as undeliverable until May 2016. These excuses are clearly disingenuous.

This Court notes that after being retained by petitioner, he did not file a notice of claim but merely mailed a copy of the police accident report under cover letter to the FDNY in Brooklyn regarding its insurance coverage. It thus appears clear that counsel was entirely unaware of the notice of claim requirement until the FDNY informed him of it in its response letter. It was counsel's responsibility, as an attorney, to know the law regarding the filing of a claim against the City, not of the FDNY to inform him of it, and it was his responsibility to ascertain the proper mailing address for filing a notice of claim. Moreover, when he did mail a notice of claim, he did not even address it to the Office of the Comptroller at the Municipal Building, as the FDNY informed he should do, but merely addressed it to "City of New York" and only to "1 Center Street".

The City of New York has many different agencies and many different departments within those agencies housed in the Municipal Building. Moreover, 1 Centre Street is the address not only of the Municipal Building, but of the headquarters of the New York City Police Department located in an entirely separate building. Logic would therefore dictate that the Postal Service would not know to what agency or department to deliver a letter that was addressed merely to "City of New York, 1 Center Street, New York, New York". Counsel apparently did not even bother to call the Comptroller's office at the number set forth in the FDNY's letter to verify the correct address and to whose attention it should be sent.

Since it was counsel's responsibility to send the notice of claim to the correct address and failed to do so, his excuse that the USPS delayed in returning the mail as undeliverable until May 2016 must be disregarded out of hand. Moreover, since the USPS tracking information posted on March 21, 2016 apprised counsel that the item was undeliverable as addressed, which counsel would have known on that date had he looked up the tracking status of the item, his excuse that he did not know about it until the notice of claim was returned by the post office in May is untenable.

It is thus clear that the failure to serve a timely notice of claim was due entirely to counsel's law office failure, which he attempts to deflect by casting blame upon the FDNY and the U.S. Postal Service. Law office failure does not constitute a reasonable excuse for the failure to serve a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d 422 [2nd Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2nd Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2nd Dept 2000]).

Although counsel is correct that the lack of a reasonable excuse for the delay is not of itself fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]), no other relevant factors are present in this matter.

Counsel argues that the City acquired timely actual knowledge of the facts constituting the claim by virtue of the fact that City employees, FDNY personnel, were involved in the accident and by virtue of the police accident report that was filed.

The City may be held to have acquired actual knowledge of the facts underlying the claim where its employees were directly involved in the accident and the police accident report gave reasonable notice from which it could have been inferred that the City was negligent and that the plaintiff sustained injuries as a result (see Lavender v Garden City Union Free School District, 93 AD 3d 670 [2nd Dept 2012]).

In the present matter, however, although City employees, FDNY firefighters, were involved in the accident, and although the police accident report relates plaintiff's version of the accident that the fire engine struck hers, it indicates that there were no injuries sustained in the accident. Therefore, the accident report did not serve to put the City on reasonable notice of the essential facts underlying plaintiff's personal injury claim, namely, that the City's employee was negligent in causing the accident and that its negligence caused injury to plaintiff.

Even if, arguendo, the accident report did set forth facts from which it could be inferred that the City committed a wrong which proximately caused plaintiff's injuries, the report was still not sufficient to impart actual notice to the City since no evidence has been presented that it was "ever filed with or otherwise brought to the attention of the officer of the City designated by law to accept service of a notice of claim" (Caselli v. City of New York, 105 AD 2d 251, 255 [2nd Dept 1984]).

A notice of claim involving a City agency must be served upon the Corporation Counsel of the City of New York or the New York City Comptroller (see Knox v. NYC Bureau of Franchises, 48 AD 3d 756 [2nd Dept 2008]). Service upon a City agency is ineffective to satisfy the notice of claim requirement (see id.). The accident report that was prepared by the police officer who responded to the accident was a Department of Motor Vehicles MV-104AN Police Accident Report (NYC) form. Pursuant to §603 of the Vehicle and Traffic Law, such accident report is filed with the Commissioner of Motor Vehicles. Pursuant to the Police Accident Report Manual published by the New York State Department of Motor Vehicles, the New York City Police Department is to send accident reports to the DMV's Accident Records Bureau in Albany. No evidence has been proffered to show that the report was filed or brought to the attention of the Corporation Counsel or the Comptroller (see Caselli v. City of New York, supra).

Therefore, the filing of an accident report with the DMV did not impart knowledge of the claim to the City so as to enable the City to conduct a proper investigation, unless additional investigations were conducted and/or reports filed that could be viewed as having put the City on reasonable notice of the facts underlying the claim. The notice of claim requirement would be rendered academic if the mere filing of a routine police accident report with the DMV were alone sufficient to excuse the claimant from serving a timely notice of claim in all motor vehicle accident cases involving a City vehicle operated by a City employee. Plaintiff has failed to proffer any evidence that the City conducted any other investigation of the accident or that any other reports were filed so as to apprise it of the facts underlying the claim.

Although counsel mailed a copy of the police accident report to the FDNY at its office in Brooklyn, it was not sent to a City officer designated by law to accept service of a notice of claim and indeed was mailed back to counsel.

The bare fact that the accident involved a City employee does not, of itself, constitute actual knowledge of the essential facts

constituting the claim. Only when the actual involvement of a City employee in the accident is viewed within the context of, and in conjunction with, the overall circumstances of the matter, which include an investigation by the City, would the fact that a City employee was involved in the accident support an inference that the City acquired actual notice of the essential facts of the claim (see Vasquez v City of Newburgh, 35 AD 3d 621 [2nd Dept 2006]). Since the police accident report did not serve to impart timely actual knowledge to the City of the essential facts constituting her personal injury claim, and since the record on this motion does not indicate that the City conducted any other investigations or reveal any other circumstances from which it may be inferred that the City acquired actual knowledge of the essential facts of plaintiff's cause of action, the lone fact that the driver of the vehicle that struck plaintiff's vehicle was a City employee did not constitute actual notice to the City of plaintiff's personal injury claim.

Although plaintiff also alleges that the City would not be prejudiced by late service of a notice of claim, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant motion where plaintiff has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the statutory 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

In any event, plaintiff has failed to show that the City would not suffer prejudice by the delay. It is the burden of the claimant seeking leave to serve a late notice of claim to show lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008). Plaintiff's only basis for her contention that the City would not suffer prejudice consists of the unmeritorious arguments that the police accident report and the FDNY's involvement in the accident imparted actual knowledge of the facts underlying the claim. Moreover, it is the opinion of this Court that the significant passage of time since the deadline for filing a notice of claim has prejudiced the City's ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]).

The untimely notice of claim served without leave of court, was thus a nullity (see Chicara v, City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]).

Accordingly, the petition is dismissed. The City may enter judgment accordingly.

Dated: October 4, 2016

KEVIN J. KERRIGAN, J.S.C.

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