

Baxter v Consolidated Edison Co. of N.Y., Inc.

2017 NY Slip Op 33454(U)

September 18, 2017

Supreme Court, Westchester County

Docket Number: Index No. 56444/2017

Judge: Lawrence H. Ecker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
SHELIA BAXTER,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE COUNTY OF WESTCHESTER and THE
CITY OF MOUNT VERNON,

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 23 were read on the motion of THE COUNTY OF WESTCHESTER ("the County"), made pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the complaint and cross-claims [Mot. Seq. 1], the motion of the CITY OF MOUNT VERNON ("the City"), made pursuant to CPLR 3211, for an order dismissing the complaint [Mot. Seq. 2], or in the alternative, for an order pursuant to CPLR § 404(a) ¹, and the cross-motion of SHELIA BAXTER ("plaintiff"), made pursuant to GML § 50-e(5), for an order deeming the Notice of Claim dated August 22, 2016 to have been timely served nunc pro tunc to that date [Mot. Seq. 3]:

PAPERS

NUMBERED

Mot. Seq. 1

Notice of Motion, Affirmation, Exhibits A-D

Affirmation in Opposition

1 - 6

7

¹ The court deems this motion for alternative relief as unnecessary as the cited section refers to special proceedings.

Reply Affirmation, Exhibit A ²	8 - 9
<u>Motion Seq. 2</u>	
Notice of Motion, Affirmation, Exhibits A	10 - 12
Affirmation in Opposition	13
<u>Motion Seq. 3</u>	
Notice of Cross-Motion, Affirmation, Exhibits A-F	14 - 21
Affirmation in Opposition to Mot. 3 and in Reply to Mot. 2	22
Reply Affirmation	23

Upon the foregoing papers, the court determines as follows:

According to her attorney's affirmation (and the complaint), plaintiff in this personal injury action claims she was injured when she tripped and fell while traversing the public highway in the vicinity of 514 Gramatan Avenue and Grand Street in Mt. Vernon (Westchester County), at or about 12:00 p.m., on July 20, 2016. She was transported to the Lawrence Hospital emergency room where she was treated for her injuries, and then discharged. Later that evening, she met with Mount Vernon Police Officer Lloyd at the scene of her fall, who prepared an incident report and took photographs [Ex. A to Mot. Seq. 3].

Plaintiff alleges that thereafter, by Notice of Claim dated July 22, 2016 [Ex. C to Mot. Seq. 3], and served August 22, 2016, the County of Westchester and the City of Mount Vernon, were notified of her accident. The Notice of Claim [Ex. C to Mot. Seq. 3] included photographs of the scene. However, the Notice of Claim states that it was addressed to "The City of Mt. Vernon", Corporation Counsel, 40 South Broadway, Yonkers, New York 10701." The return receipt for the Notice of Claim [Ex. D to Mot. Seq. 3] shows that it was received by the City of Yonkers on August 24, 2016. Apparently, after not having heard from the City of Mount Vernon, plaintiff filed the summons and complaint [NYSCEF Doc. 1] on April 28, 2017. Defendant Con Edison filed its answer on June 6, 2017 [NYSCEF Doc. 13]. Each of the other defendants now moves to dismiss the complaint, and plaintiff moves to compel acceptance of the Notice of Claim.

Mot. Seq. 1: The County of Westchester

The County avers that it does not own, have control, service, or otherwise have any involvement with Gramatan Avenue or Grand Street in Mount Vernon. In support of its argument the County has submitted two affidavits from James Statini, Superintendent of Road Maintenance for the County of Westchester, who states that he is familiar with the

² Court rules require that the same exhibit label not be repeated within the same motion sequence.

roadways and sidewalks serviced within the County of Westchester, and that the area described by plaintiff as where her fall occurred is not within the jurisdiction of the County. He included as an exhibit [Ex. D to Mot. Seq. 1], a copy of the County Road List that does not show Gramatan Avenue, Mount Vernon, as within the inventory of the County's responsibilities. Plaintiff, in opposition, does not rebut these assertions, but rather argues that perhaps she will learn something to contrary by way of disclosure, and that the motion is therefor premature.

The court finds that based upon the unrefuted affidavits of Statini, and the documentation he has submitted, of which the court takes judicial notice, the County is entitled to dismissal of the complaint and cross-claims. Plaintiff has failed to demonstrate that engaging in discovery proceedings will assist her in making a case against the County. The court further finds the codified list provided by the County constitutes documentary evidence, as contemplated by CPLR 3211(a)(1).

A motion to dismiss a complaint based upon documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681 [2d Dept 2017]; *Wilson v Poughkeepsie City School Dist.*, 147 AD3d 1112 [2d Dept 2017]; *Bibbo v Arvanitakis*, 145 AD3d 656 [2d Dept 2016]. The court finds this to be the case here. Plaintiff engages in speculation that discovery might reveal something helpful to plaintiff, but makes no meaningful showing of necessity. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. *CitiMortgage, Inc. v Guillermo*, 143 AD3d 852 [2d Dept 2016]; *Pabarroo v TS 405 Lexington Owner, LLC*, 141 AD3d 634 [2d Dept 2016]. The County's motion to dismiss is granted.

Mot. Seqs. 2 and 3: The City of Mount Vernon and Plaintiff.

It is undisputed the City did not receive the Notice of Claim, as the evidence shows it having been addressed to, and received by the City of Yonkers, a fact that should have been recognized by plaintiff's attorneys when their office received the return receipt showing that it went to Yonkers. It is also undisputed that plaintiff, under letter dated November 29, 2016, received from the City of Mount Vernon, Office of the Corporation Counsel, pursuant to her "Freedom of Information Law (F.O.I.L.) Request" [Ex. B to Mot. Seq. 3], the records she had requested, namely a copy of the Incident Report and the photographs, as prepared by P.O. Lloyd. As noted by plaintiff, that report stated at the end of the narrative "This report is for documentation purposes. A copy of this report will be filed away for SSD to notify the Law Department and DPW."³

³ The court assumes that "SSD" means Streets and Sidewalks department.

In determining whether to grant leave to serve a late notice of claim, a court, in its discretion, may consider all relevant facts and circumstances, including, but not limited to, whether (1) the municipality or public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim rose or a reasonable time thereafter, 2) the delay would substantially prejudice the municipality or public corporation in its defense, and 3) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim. *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460-461 [2016]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]. Another factor is “whether the claimant was an infant or mentally or physically incapacitated” [GML 50-e(5)], although the factor of infancy alone does not compel the granting of a motion for leave to serve a late notice of claim, particularly when the delay in serving the notice of claim was not the product of the plaintiff’s infancy. *Rowe v Nassau Health Care Corp.*, 57 AD3d 961 [2d Dept 2008]; *Arias v NYC Health and Hospitals Corp.*, 50 AD3d 830, 831 [2d Dept 2008]. Generally, the merits of a claim are not examined on a motion to serve a late notice of claim. *Matter of Ramirez v City of New York*, 148 AD3d 908 [2d Dept 2017].

The presence or absence of any one factor is not determinative and the absence of a reasonable excuse is not necessarily fatal where there were actual notice and an absence of prejudice. *Matter of Viola v Ronkonkoma Middle School*, 107 AD3d 1009 [2d Dept 2013]. However, whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim is seen as a factor which should be accorded great weight.” *City of New York v County of Nassau*, 146 AD3d 948 [2d Dept 2017].

Here, under these circumstances, the court must determine whether plaintiff should be excused from her failure to have timely served the City of Mount Vernon with her Notice of Claim. The court finds that plaintiff should not be penalized for her attorneys’ failure to recognize initially, and upon the return of the mailing receipt, that the Notice of Claim had been sent to Yonkers rather than Mount Vernon. This constitutes law office failure, as contemplated by CPLR § 2001, which authorizes the court to correct the error, provided a “substantial right of a party is not prejudiced.” CPLR § 2004 authorizes the court to grant extensions of time, upon good cause shown, and upon such terms as may be just, which is similar in its ameliorative intent as is GML § 50-e(5).

The court finds that as of the date of the incident in question, and within eight hours or so of plaintiff having fallen, the Incident Report and the photographs had been compiled by the responding police officer, with a notation on the report as to where the report should be forwarded, namely to the office of the corporation counsel, the department of public works and the streets and sidewalks department. One would think that this is done for at least two purposes, namely to alert the municipal authorities to what may be a condition that needs to be addressed, and as a record to be maintained in the event litigation thereafter ensues. The court finds that notwithstanding plaintiff’s attorneys’ failure to cure their error, the fact that 8 months went by from the time they thought they properly served the Notice of Claim until the commencement of this action, without the demand having been made by the City for the conduct of a GML § 50-h hearing, it was not a crucial delay

such that the City has been prejudiced, particularly when no such prejudice has been alleged.

Given this confluence of facts, the court finds that plaintiff is entitled to the benefit of the remedial statute, such that the Notice of Claim is deemed to have been timely served. See *Kerner v County of Nassau*, 150 AD3d 1234 [2d Dept 2017]; *Gershanow v Town of Clarkstown*, 88 AD3d 879 [2d Dept 2011]; *Ruffino v City of New York*, 57 AD3d 550, 551 [2d Dept 2008]. In each of these cases, as here, the municipality had actual knowledge of the essential facts and was unable to demonstrate prejudice, thereby justifying the granting of plaintiff's application. The court finds that this relief should be afforded the plaintiff herein, subject however, to the right of the City to conduct a GML § 50-h hearing, if so demanded, upon the terms as set forth infra. The City's motion to dismiss is denied and plaintiff's cross-motion is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant THE COUNTY OF WESTCHESTER [Mot. Seq. 1], made pursuant to CPLR 3211(a)(1) and (a)(7), is granted, and the complaint and cross-claims are dismissed; and it is further

ORDERED that the motion of defendant THE CITY OF MOUNT VERNON [Mot. Seq. 2], made pursuant to CPLR 3211, is denied; and it is further

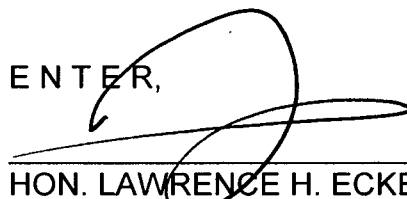
ORDERED that the motion of plaintiff SHELIA BAXTER [Mot. Seq. 3], made pursuant to GML § 50-e(5), is granted, and the Notice of Claim dated July 22, 2016, is deemed to have been timely served upon defendant THE CITY OF MOUNT VERNON within ninety (90) days of the date of the occurrence of July 20, 2016; and it is further

ORDERED that upon the written demand of defendant THE CITY OF MOUNT VERNON that she appear for the conduct of the GML § 50-h hearing, plaintiff SHELIA BAXTER shall so comply and appear for said hearing; and it is further

ORDERED that the remaining parties to this action shall appear at the Preliminary Conference Part of the Court, Room 811, on October 16, 2017, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
September 18, 2017

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Scott Baron & Associates, P.C.
Attorneys for Plaintiff
Via NYSCEF

The City of Mount Vernon
Office of the Corporation Counsel
Via NYSCEF

David M. Santoro, Esq.
Consolidated Edison Company of New York, Inc.
Via NYSCEF

The County of Westchester
Office of the County Attorney
Via NYSCEF