

Sinatra v City of New York

2019 NY Slip Op 30534(U)

March 5, 2019

Supreme Court, New York County

Docket Number: 161133/2018

Judge: Julio Rodriguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

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INDEX NO. 161133/2018

MICHAEL SINATRA,

MOTION DATE 02/14/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 15, 16, 17, 18

were read on this motion to/for LEAVE TO FILE LATE NOTICE OF CLAIM

Upon the foregoing papers, petitioner's application pursuant to General Municipal Law (GML) § 50-(e) seeking leave to file a late notice of claim, nunc pro tunc, is hereby denied.

This action arises from an accident that occurred on May 16, 2018, when petitioner alleges that a wall holding up a construction site fell on him while he was walking on the sidewalk, which caused him to sustain injuries. Petitioner concedes that he failed to serve a notice of claim on the City of New York (hereinafter "the City") before the expiration of the ninety-day period. Therefore, petitioner now seeks leave to file a late notice of claim. Respondent opposes petitioner's order to show cause.

Pursuant to GML § 50-i (1), service of a notice of claim is a condition precedent to filing a claim against "a city, county, town, village, fire district or school district." Said notice of claim must be filed within ninety days after the claim arises. (GML § 50-i). However, upon application, the court, in its discretion, may extend the time to serve a notice of claim, provided that the extension does not exceed the statute of limitation applicable to actions against a public corporation. (GML § 50-e[5]). A court considering a motion for leave to serve a late notice of claim upon a public corporation must consider various factors, of which the "most important, based on its placement in the statute and its relation to other relevant factors" is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim or a reasonable time thereafter. (Andrews v Long Is. R.R., 110

AD3d 653, 653 [2d Dept 2013] citing *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 147, 851 N.Y.S.2d 218; see *GML* § 50–e[5]). The Court shall also consider whether the claimant made an excusable error concerning the identity of the public corporation; whether the delay would substantially prejudice the public corporation in its defense; and whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim. (*Id.*) “A court’s decision to grant or deny a motion to serve a late notice of claim is ‘purely a discretionary one.’” (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016] citing *Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 265 [1980]).

Given that the subject accident occurred on May 16, 2018, petitioner had until August 14, 2018, to file his notice of claim. However, petitioner failed to timely do so. Petitioner filed the instant proceeding on November 28, 2018, more than six months after the alleged accident. In support of his application, petitioner submits an affidavit stating that due to serious physical pain and his physical therapy sessions, he was unable to seek legal representation. He further states that he was unaware of the ninety-day statutory period to serve a notice of claim. Petitioner retained counsel on September 19, 2018.

Upon a review of the motion papers, this Court finds that petitioner has failed to assert a reasonable excuse for his delay. Petitioner does not submit any proof that he was physically incapacitated, hospitalized or in any other way incapable of timely retaining counsel or filing his notice of claim. (See *Matter of Rivera v NY City Hous. Auth.*, 25 AD3d 450 [1st Dept 2006]). Additionally, ignorance of the law is not a valid excuse for failure to serve a timely notice of claim” (*Alper v City of New York*, 228 AD2d 390 [1st Dept 1996] quoting *Matter of Tricomi v New York City Hous. Auth.*, 191 AD2d 447). Nevertheless, the failure to assert a reasonable excuse, alone, is not fatal to the application. (*Velazquez v City of N.Y. Health and Hosps. Corp.*, 69 AD3d 441, 442 [1st Dept 2010], citing *Ansong v City of NY*, 308 AD2d 333 [1st Dept 2003]).

In further support of his application, petitioner argues that he should be granted permission to serve a late notice of claim because the City had actual knowledge of the essential facts shortly after the statutory ninety-day period expired. Specifically, petitioner states that the instant motion was made within three months after the deadline to file a notice of claim had expired. Therefore, it is petitioner’s position that there is little, if any, prejudice to the City as a result of the delay. However, contrary to petitioner’s conclusory arguments, this Court finds that petitioner has failed

to establish that the City acquired actual knowledge of the essential facts constituting the claim within ninety-days *of the accrual of the claim* (emphasis added) or a reasonable time thereafter. In fact, petitioner seems to acknowledge that the City only acquired knowledge of the essential facts constituting the claim when the instant motion was filed on November 28, 2018, over six months after the accrual of the claim herein. Petitioner provides no facts or arguments whatsoever to support his proposition that the City acquired knowledge within ninety days of the subject accident or a reasonable time thereafter, prior to filing the instant application.

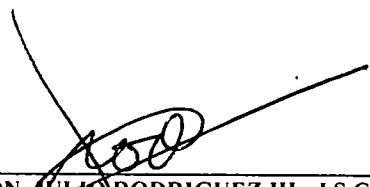
With respect to prejudice, “[t]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice... Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed.” (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016]). Petitioner conclusively argues that “it is virtually inconceivable that prejudice could accrue in such a short time frame,” given that the instant motion “was made within three (3) months after the deadline to file a notice of claim.” (Petition, ¶12). As indicated above, the instant application was filed over six months after the subject accident and, unlike in *Beatty v Saratoga County*, 74 AD2d 662, 663 [3d Dept 1980], there is no evidence that the City conducted an investigation shortly after the accident while the information was readily available. Thus, the six-month delay between the alleged accident and the filing of the instant motion, coupled with the City’s lack of actual knowledge, compromised defendant’s ability to investigate the matter, identify witnesses and collect testimony based upon “fresh memories.” (*See Arias v. NY City Hous.*, 40AD3d 298 [1st Dept 2007]; *see Auth. Matter of Rivera v NY City Hous. Auth.*, *supra.*)

Therefore, the absence of a reasonable excuse and the failure to demonstrate actual notice and a lack of prejudice warrants the denial of the instant request¹. Accordingly, it is

¹ In its Affirmation in Opposition, the City further argues that petitioner’s application should be denied because petitioner does not have a meritorious cause of action. However, in light of this Court’s determination that leave to serve a late notice of claim is not warranted herein for the reasons stated above, this Court did not consider said argument.

ORDERED that the application for leave to file a late Notice of Claim is denied, the motion to dismiss is granted, and the petition is hereby dismissed.

March 5, 2019


HON. JULIO RODRIGUEZ III, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE