Diaz v City of New York
2019 NY Slip Op 31808(U)
June 24, 2019
Supreme Court, New York County
Docket Number: 162054/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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EDDY DIAZ,

Petitioner,

- against -

CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Respondents.

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Index No: 162054/2018

DECISION and ORDER

Mot. Seq. #001

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Eddy Diaz ("Petitioner") brings this action pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking an Order pursuant to General Municipal Law ("GML") § 50-e(5) deeming that the Notice of Claim is timely served against Respondents The City of New York ("the City") and the New York City Housing Authority ("NYCHA") (collectively, "Respondents"). Respondents oppose.

Background

Petitioner alleges that he was exposed to lead-based paint from February 2001 until present, while residing at 1595 Madison Avenue, Apartment 2H, New York, NY 10029 (the "Subject Premises"). Petitioner alleges that the Subject Premises is owned and managed by Respondents.

Petitioner was born on November 24, 1999 and has resided in the Subject Premises with his mother, Nereida Martinez ("Ms. Martinez"), from his birth until present. Petitioner was first diagnosed with a blood lead level of five micrograms per deciliter on October 31, 2001. By September 2002, Petitioner's elevated blood lead levels fell to two micrograms per deciliter, and Petitioner's last blood test on December 14, 2005, showed Petitioner's blood lead level was three micrograms per deciliter. In September 2018, Ms. Martinez contacted Petitioner's current attorneys to determine whether there was legal action. On December 21, 2018, Petitioner filed his Petition against Respondents. NYCHA filed its Affirmation in Opposition on February 13, 2019. The City filed its Affirmation in Opposition on February 15, 2019.

Parties' Contentions

Petitioner's Contentions

Petitioner contends that § 50-e(5) should be construed liberally because it is remedial in nature and the Court has the discretion to grant a late Notice of Claim. Petitioner further contends that under § 50-e(5) infancy is specifically considered by the Courts when considering to deem a late Notice of Claim timely served. Petitioner argues he filed the claim within the statute of limitation because he was an infant when the claim arose, and he is currently nineteen years old which is within one year and ninety days from Petitioner's eighteenth birthday.

Petitioner argues that Respondents had actual notice within ninety days of the claim. Petitioner contends that Respondents had the knowledge that young children resided in the Subject Premises and were aware of requirements directing NYCHA to maintain the Subject Premises in a reasonably safe condition. Petitioner contends that pursuant to New York Administrative Code § 27-2056.5(a), buildings in New York constructed prior to 1960 are presumed to have lead-based paint, and here the Subject Premises was constructed in 1955. Petitioner argues that even if Respondents did not have actual knowledge, they had an independent duty to conduct inspections of the Subject Premises annually, and NYCHA would have obtained notice of the facts had it done inspections. Petitioner further argues that the Minutes of the New York City Council Committee on Public Housing, December 5, 2017 (the "transcript"), demonstrates that the City exempted more than 123,000 NYCHA apartments, and therefore the City effectively assumed control by declaring the apartments safe. (*see* Exhibit A, at 39-43). Petitioner contends that the exemption process required NYCHA to have trained and certified inspectors and abatement staff, and NYCHA's Chairperson at the time, Shola Olatoye, stated in the transcript that the inspectors received "a very short training."

Petitioner states that his blood tests, which showed he had elevated blood lead levels, were provided to the Department of Health and Mental Hygiene ("DOH"). Petitioner contends that an infant's elevated blood lead level triggers a requirement for the DOH to conduct an environmental investigation of the infant's dwelling. Petitioner argues that even though Petitioner's blood lead level never reached ten micrograms per deciliter, NYCHA and DOH had a duty to conduct inspections annually and maintain a "lead-free environment" in apartments with children under seven.

In addition, Petitioner contends that Respondents cannot show any prejudice. Petitioner argues that courts have permitted lengthy delays in submitting a notice of

a claim when justice so requires it, and here, Petitioner should not be punished for his mother's failure to bring a claim to protect his rights more promptly. Petitioner contends that the nature of lead poisoning happens over a long period of time and Respondents have not been prevented from examining the violations that caused the alleged injury. Petitioner contends that the blood test results were retained by the DOH and this can negate prejudice to a municipal corporation in regards to an infant bringing a late Notice of Claim.

NYCHA's Contentions

NYCHA opposes Petitioner's motion. NYCHA argues that the motion should be denied in its entirety. NYCHA argues that Petitioner had until January 29, 2002 to serve a Notice of Claim on NYCHA pursuant to GML § 50-e(5), which is 90 days from Petitioner's initial blood level diagnosis. NYCHA asserts that Petitioner fails to demonstrate a reasonable excuse for the delay and instead uses the infancy toll as the excuse. NYCHA argues that infancy does not automatically constitute a reasonable excuse, and there needs to be a showing of a nexus between the infancy and the delay. NYCHA contends that Petitioner states that he became aware of his elevated blood lead levels in 2018 but does not provide any information on how he came into possession of this information. NYCHA asserts that Petitioner has not submitted documents showing that lead paint testing was done at the Subject Premises.

NYCHA argues that the Subject Premises was not constructed in 1955, but construction was commenced in November 1963 and the Certificate of Occupancy was issued on November 6, 1964. NYCHA contends that the presumption of lead paint does not apply because the Subject Premises was constructed after 1960. Moreover, NYCHA argues that Petitioner never claims to have notified it of Petitioner's elevated blood lead level.

Additionally, NYCHA contends that the delay is highly prejudicial. NYCHA states that to properly determine whether the alleged exposure to lead in the Subject Premises resulted in the alleged physical, medical and cognitive conditions, NYCHA at a minimum would have to review, the mother's pre-natal records, Petitioner's birth records; Petitioner's primary physician's medical records including results of any and all tests performed; Petitioner's blood test results; all records relating to discovery and treatment of lead poisoning; Petitioner's academic records including day-care, preschool and school records; records of any educational or therapeutic services received by the Petitioner; and state or local regulatory agency records relating to the inspection and testing of the apartment and any treatment afforded to the Petitioner. (NYCHA's Aff. in Opp. at 7).

The City's Contentions

The City filed Opposition[1] to Petitioner's motion. The City argues that Petitioner's application for leave to file a late Notice of Claim should be denied. The City contends that the court has the discretion to grant or deny an application made for leave to serve a late notice of claim. The City argues that the State of New York defined lead poisoning as a blood lead level equal to or greater than twenty micrograms per deciliter. The City contends that the Federal Department of Health and Human Services Centers for Disease Control and Prevention ("CDC") has set the threshold level for intervention at fifteen micrograms per deciliter during the time at issue. The City contends that since the level for intervention was lower than fifteen micrograms per deciliter the DOH did not need to conduct an inspection on the Subject Premises. The City contends that from November 1999 until the present the Premises was not owned or leased by the City but was owned by NYCHA, therefore the City cannot be liable for exposure to lead paint by Petitioner.

The City further argues that any claim of negligence asserted against it lacks merit since the City did not own, manage or control the Subject Premises and the Petitioner would need to argue that there is a special duty in order to demonstrate that the City owed a duty of care to show negligence. The City further contends that Petitioner failed to plead that the City breached a statutory duty. The City states that the public safety inspections, here the lead paint statutes, are government functions and are performed for the benefit of all members of the public and do not create a private right of action to individuals. The City concludes that it did not have an obligation to inspect the Subject Premises because Petitioner's blood lead levels did not reach the threshold level, but even if the City did inspect, no duty would have been assumed. Furthermore, the City argues that there is no independent tort of conspiracy under New York law, therefore Petitioner's allegations that the City conspired with NYCHA is without merit.

The City argues that Petitioner has failed to provide a reasonable excuse for delay in filing the Notice of Claim. The City contends that Petitioner has failed to establish a nexus between the delay in filing a notice of claim and that Petitioner was an infant on the date of the claim. The City contends that it did not receive actual knowledge of the essential facts constituting Petitioner's claim. The City further argues that Petitioner has failed to establish his burden that the delay in filing the Notice of Claim is not prejudicial because Petitioner only offers speculative claims. The City further contends that GML § 50-e was enacted to provide safeguards to

[1] The City filed its Affirmation in Opposition on February 15, 2019. The Order to Show Cause signed by Justice Rakower on January 3, 2019, Ordered Opposition to be filed by February 13, 2019.

protect municipalities and this claim requiring the City to address environmental conditions from seventeen years ago would contradict the statute.

Legal Standards

General Municipal Law § 50-e(1)(a) states that notice of a claim against a municipality must be served within ninety days after the claim arises. Notice of claim requirements are intended to protect the municipality and governmental entities from "unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a claim while the facts are still 'fresh.'" (*Matter of Nieves v New York Health & Hosps. Corp.*, 34 A.D. 3d 336, 337 [1st Dept 2006]).

Section 50-e(5) of the General Municipal Law permits the courts to extend the time to serve a notice of claim, in its discretion. "In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e (5), the key factors considered are '[1] whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, [2] whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and [3] whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.'" (*Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]). "The failure to set forth a reasonable excuse is not, by itself, fatal to the application." (*Velazquez*, 69 A.D. 3d at 442).

The plaintiff is not required to establish conclusively the merits of the claim at this stage in the litigation but only that there are sufficient facts to establish the reasonableness of said claims. (*Ali ex rel. Ali v. Bunny Realty Corp.*, 253 A.D.2d 356, 358 [1998]) (citations omitted).

"When an infant claimant is involved, the court possesses the discretion to consider whether to afford the infant the tolling effect of CPLR 208 to permit the late filing of a notice of claim during the period of infancy. (*Fierro v. City of New York*, 271 A.D.2d 608, 609 [2d Dept 2000]). The court can grant an extension of time to serve a notice of claim if the Plaintiff was an infant during the "relevant period" and if there is no prejudice to the defendants for the delay. (*Febles v. City of New York*, 15 A.D.3d 248, 249 [2005]). Plaintiff does not have to "[d]emonstrate a nexus between his infancy and the delay in filing the notice, a 1976 statute eliminated this requirement (L.1976, ch. 745)." (*Ali ex rel. Ali*, 253 A.D.2d at 357).

Under the statute, actual knowledge is only one factor the court weighs. The court will consider whether the defendants failed to acquire knowledge of the claim because of a disregard of its duty to inspect in the first place. (*Ali ex rel. Ali*, 253 A.D.2d at 358).

A plaintiff must show that the delay would not substantially prejudice the defendant so that "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." (*Velazquez*, 69 A.D. 3d at 442).

Discussion

Upon oral argument on May 7, 2019, Petitioner has not demonstrated the absence of prejudice. (*Velazquez*, 69 A.D. 3d at 442). There was no presumption that the Subject Premises contained lead paint because the Subject Premises was constructed after 1960 and Petitioner's blood lead level never reached fifteen micrograms per deciliter, the threshold level for intervention during the time at issue. Petitioner's blood lead level reached five micrograms per deciliter on October 31, 2001. Respondents would not have been notified of Petitioner's elevated blood lead level and Respondents would not have been required to conduct inspections of the Subject Premises.

Therefore, Petitioner's Order to Show Cause seeking an Order pursuant to GML 50-e(5) permitting service of a Notice of Claim by the Petitioner against the City of New York and a Notice of Claim against New York Housing Authority and deeming same timely served is denied.

Wherefore, it is hereby

ORDERED that the Petition is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 24, 2019

EILEEN A. RAKOWER, J.S.C.