

Ali v City of New York
2019 NY Slip Op 32076(U)
July 16, 2019
Supreme Court, New York County
Docket Number: 151301/2019
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

USAMA ALI,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ANTHONY TAI

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

LATE NOTICE OF CLAIM

DECISION AND ORDER

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

This action arises from a motor vehicle accident that occurred on May 6, 2018, when petitioner was traveling eastbound on East 72nd Street and approaching its intersection with York Avenue. Petitioner contends that he had a green light in his favor and that he was struck by a New York City Police Department ("NYPD") vehicle, which was traveling southbound on York Avenue and allegedly ran a red light. Petitioner now seeks leave to file a late notice of claim. Respondent opposes the petition. On May 9, 2019, this Court heard oral arguments on this motion.

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 to 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 6, 2018, petitioner had until August 4, 2018, to file a timely notice of claim. However, petitioner did not file a notice of claim until January 7, 2019, approximately eight months after the accident. In an affidavit, petitioner states that even though he retained an attorney to represent him in connection with this accident, the attorney only represented him in his workers’ compensation case stemming from this accident. He further states that he lacks any legal training or experience and was unable to draft or serve the required notice of claim. Lastly, petitioner avers that as a result of the accident, he sustained injuries that required extensive physical therapy, rehabilitation and surgery.

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 to represent him with regard to this case 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 the City acquired actual knowledge of the essential facts constituting the claim shortly after the accident. Specifically, petitioner argues that actual notice is established by the police report prepared by the NYPD and by virtue of the NYPD officers’ personal involvement in the accident. In his moving papers, petitioner notes that “[a]lthough the ‘amended’ police report... authored by an NYPD police officer states that the police officer had a green light, and that initially I allegedly thought I had the green light but then allegedly said that I was uncertain of the light color, this is entirely untrue. At all times, I was well aware that I had the green light.” Petitioner further notes that he has never seen the original police report. In opposition, the City argues that the police report does not provide actual notice of the essential facts constituting the claim as the report reads that petitioner “was uncertain that he had the green light.”

At oral argument on May 9, 2019, this Court inquired from City whether they were in possession of the original police report. Because the City could not provide the Court with a response, this Court directed the City to provide a copy of the original, non-amended police report or an affidavit that no such report exists. On May 31, 2019, the City filed two affidavits from NYPD employees. The Affidavit of Police Officer Stacy Minchin, who is assigned to the Information Technology Bureau, affirms that police accident reports are prepared and maintained within the NYPD’s Finest On Line Record Management System (“FORMS”) and further states that if a police accident report is amended, the first version is overwritten with the changes and only the original is electronically maintained in FORMS. With regard to the subject accident,

police officer Minchin states that the amended police accident report is the only report that exists in FORMS. The Court notes that while the affidavit of Ms. Minchin states that “[o]nly the amended PAR [police accident report] can be accessed using the FORMS application,” it is not clear whether a hard copy of the original police report would exist and whether any effort, other than searching in FORMS, to obtain a hard copy of the original, non-amended police accident report was made. Furthermore, the affidavit of Sgt. Farina, who prepared the police accident report at issue, states that he is not in possession of the original police accident report. Sgt. Farina states that after she prepared the original report, she prepared a “Collision Report – Police Department Vehicle”, and subsequently amended the police accident report to reflect the generation of the Collision Report.

In a response letter, petitioner notes that “because the original police report allegedly no longer exists, it is unknown what was contained therein, or how same differs from the amended report.” Petitioner further states that NYPD’s assertion that “the amendment of a police accident report entirely overwrites the initial police accident reports... is contradicted by documents maintained by my office on other files involving NYPD.” Specifically, petitioner’s attorney states that in his representation of a former client for personal injuries sustained in a February 25, 2018 accident in Manhattan (approximately two and a half months prior to the subject accident), not only does he possess the initial police accident report but also possesses the amended police accident report. Petitioner attaches a copy of same. Therefore, petitioner argues that the City’s representation that an amended police accident report overwrites the initial police accident report “does not appear to be accurate.”

It is indeed quite astonishing to this Court that an original, non-amended police accident report would not exist in cases where an amended report is subsequently generated. In any event, upon a review of the amended police accident report and collision report, this Court finds that said reports did apprise the City of the essential facts constituting the claim herein. Unlike in *Pineda v City of New York*, 305 AD2d 294 [1st Dept 2003] and *Mateo v City of New York*, 245 AD2d 25 [1st Dept 1997], the contemporaneous amended police report herein did connect petitioner’s accident with the alleged negligence claim against the City. The amended police report specifically states that petitioner believed he had the green light when the collision occurred at the intersection. The fact that the police officer’s notes in the amended report also indicate that “[l]ater driver 2 [petitioner] was uncertain that he had the green light,” is of no moment. In fact, it seems to this Court that said phrase was only added after the collision report was completed given that the phrase is not present in the section titled “statement of civilian operator” and only appears in the section titled “preliminary statement of investigating supervisor” in the collision report.

Because both the amended police accident report and the collision report indicate that petitioner thought he had the green light and therefore connected the accident with the alleged negligence claim against the City, this Court finds that the City was aware of a potential claim against it and the essential facts forming the basis of the claim within ninety days after the claim arose.

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]). While the instant application was filed approximately five months late, this Court finds that the City would not be substantially prejudiced by the delay. The subject accident involved an NYPD vehicle and as a result a “Collision Report-Police Dept. Vehicle” was made. It appears by the collision report that the NYPD indeed conducted an investigation of the accident involving the NYPD vehicle and in fact made findings and recommendations (*see* collision report, NYSCEF item #15). Additionally, petitioner argues that the City will not suffer any prejudice as they employ two witnesses to the subject accident (i.e. operator police officer Anthony Tai and passenger police officer Lucas Lorenzo). Thus, this Court finds that petitioner met his initial threshold burden of demonstrating the absence of substantial prejudice to the City. (*See Nieto v. City of New York*, 170 AD3d 1022, 1023 [2nd Dept 2019]). In opposition, the City failed to rebut petitioner’s showing with any particularized indicia of prejudice.

In light of this Court’s determination that the City had actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim, coupled with the absence of any evidence showing that the City will be substantially prejudiced, it is hereby

ORDERED that petitioner’s motion seeking leave to file a late notice of claim is granted; it is further

ORDERED that petitioner’s late notice of claim, as served upon the City on January 7, 2019, is deemed served and filed, *nunc pro tunc*; and it is further

ORDERED that Petitioner shall appear for a hearing pursuant to General Municipal Law §50(h) upon notice.

July 16, 2019



HON. JULIO RODRIGUEZ, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

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