In Kyu Kim v New York City Tr. Auth.
2019 NY Slip Op 33845(U)
December 11, 2019
Supreme Court, New York County
Docket Number: 162586/2014
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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In Kyu Kim,

Petitioner,

-against-

The New York City Transit Authority and Denise Colon,

Respondents.
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DECISION AND ORDER

Index No.: 162586/2014

Mot Seq: 3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Paper	Numbered	NYCEF #
Defendant's Motion/ Affirmation/Memo of Law	1	57-65
Plaintiff's Affirmation in Opposition/Memo of Law	2	66-69
Defendant's Affirmation in Reply	3	71-72

LISA A. SOKOLOFF, J.

This personal injury action arises out of a motor vehicle accident on July 28, 2014 in which Plaintiff Kyu Kim alleges that a bus owned and controlled by Defendant New York City Transit Authority (Transit) and operated by Defendant Dennis Colon collided with Plaintiff's vehicle at the intersection of 178th Street and Wadsworth Avenue in the Bronx.

Defendants move for an order pursuant to CPLR § 3211(a)(7) to dismiss Plaintiff's complaint for failure to file a timely notice of claim. In support of their motion, Defendants contend that because the cause of action arose on July 28, 2014, pursuant to General Municipal Law § 50-e, Plaintiff was required to file his notice of claim by October 26, 2014, but did not do so until November 12, 2014. Since Plaintiff failed to serve his notice of claim within the statutory period, the notice of claim, served November 12, 2014 without seeking leave of the court, was a nullity.

In opposition, Plaintiff contends that Defendants made a judicial admission in their answer that they received the notice of claim within 90 days of the accident, and further, that Defendants should be equitably estopped from asserting a lack of notice of claim.

The summons and complaint, filed by Plaintiff's former counsel on December 19, 2014, states in pertinent part in Paragraph 30: "That a Notice of Claim was duly and timely served on the defendants, less than ninety (90) days after the cause of action herein accrued, more than (30) days have elapsed since the service of said Notice of Claim and/or Notice of Intention to Sue upon the defendants, and that defendants have failed, neglected and refused to pay, settle, compromise or adjust the claims of the plaintiff herein."

On February 25, 2015, Defendants interposed an answer which, in Paragraph 3, admitted: "that a certain paper purporting to be a notice of claim was received by the office of the defendant(s), NEW YOR CITY TRANSIT AUTHORITY and DENNIS COLON; within ninety days of the alleged occurrence herein and that more than thirty days elapsed since receipt thereof and said matter remains unadjusted and unpaid."

Plaintiff is unable to produce the timely-filed notice of claim. According to Plaintiff's submission, in September 2014, Plaintiff's counsel was substituted, and was "assured" by the former counsel that the notice of claim had been properly served. Although Plaintiff's former counsel delayed producing the file, eventually it was delivered. At that time, the handling attorney at Plaintiff's substituted law firm, whose whereabouts are now unknown, "stated that the notice of claim had been timely sent." Plaintiff's counsel does not know why a second notice of claim was filed.

At the end of 2015 through 2016, Plaintiff's counsel's office began to scan client files onto a server in an attempt to become paperless. Due to a malfunction in 2017, the server failed and some of the files pertinent to this action were subsequently corrupted and

could not be recovered. Plaintiff's counsel was unable to locate the physical records, as the handling attorney had misplaced the file.

Plaintiff contends that had Defendants denied receipt of the notice of claim in their answer in February 2015, there would have been motion practice and additional copies and records containing the valid notice of claim. However, due to the admission of receipt of the notice of claim, there was no legal action taken to validate the notice of claim on behalf of Plaintiff.

Public Authorities Law § 1212(2) requires service of a notice of claim upon Transit "within the time limited by, and in compliance with all of the requirements of section [50-e] of the general municipal law." General Municipal Law (GML) § 50-e(1)(a) requires the service of a notice of claim as a condition precedent to the commencement of a tort action against a public corporation within 90 days after the claim accrues (*Ruiz v New York City Health and Hospitals Corp.*, 165 AD2d 75 [1st Dept 1991]). A court, in its discretion, may extend the time to serve a notice of claim but the extension may not exceed the time limited for the commencement of an action (GML § 50-e(1); *Ahnor v City of New York*, 101 AD3d 581 [1st Dept 2012]). Service of a late notice of claim is a nullity if made without leave of court (*McGarty v City of New York*, 44 AD3d 447 [1st Dept 2007]) and the courts do not have the authority to deem a late notice of claim timely served *nunc pro tunc* after the statute of limitations has expired (*Bobko v City of New York*, 100 AD3d 439 [1st Dept 2012]).

Here, Plaintiff's counsel asserts that he was informed both by his former counsel and by a former associate of his office that the notice of claim was timely served. His affirmation, based on his personal knowledge of the underlying facts, was a proper vehicle for the submission of evidence in admissible form (*Sela v Hammerson Fifth Ave., Inc.*, 277 AD2d 7 [1st Dept 2000]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The notice

of claim that was served November 12, 2014 without leave of the court, was not in compliance with GML § 50-e(5) and therefore is a nullity.

Judicial Admissions

"Facts admitted in a party's pleadings constitute formal judicial admissions and are conclusive of the facts admitted in the action in which they are made" (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403 [2014]; *Roxborough Apartments Corp. v Kalish*, 29 Misc3d 41 [1st Dept 2010]). Formal judicial admissions take the place of evidence and are concessions, for the purposes of litigation, of the truth of a fact alleged by an adversary (*Addo v Melnick*, 61 AD3d 453 [1st Dept 2009], citing Prince, Richardson On Evidence, § 8–215, at 523). "Examples of formal judicial admissions include: (1) admissions of fact made pursuant to CPLR 3123, (2) facts admitted pursuant to a stipulation, (3) facts admitted in open court, such as a plea in a criminal proceeding, and (4) facts admitted in a formal pleading" (*Id.* at 457, quoting Prince, Richardson On Evidence, § 8–215, at 523-524). Assertions in a pleading that are made "upon information and belief" do not constitute formal or informal judicial admissions (*Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d 523 [1st Dept 2011]).

In contrast, informal judicial admissions are facts incidentally admitted during the course of a judicial proceeding (*Addo*, at 457, citing Prince, Richardson On Evidence, § 8–219, at 529), such as a statement made by a party at a deposition (*Addo*, at 458), statements by counsel in an affidavit in support of a motion (*People v Rivera*, 45 NY2d 989 [1978]), statements by counsel in an affidavit in a related action (*Matter of Union Idemn. Ins. Co. of N.Y. v. American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996]), or an admission of fact in an original pleading, although later amended (*Imprimis Investors LLC v Insight Venture Management, Inc.*, 300 AD2d 109 [1st Dept 2002]). An informal judicial admission is not conclusive, but rather some evidence of the fact admitted (*Addo*, at 457).

Here, Defendants admit in paragraph 3 of their answer to the complaint "that a certain paper purporting to be a notice of claim was received … within ninety days of the alleged occurrence."

Defendants argue that this court has already resolved this issue in *Lee v Metropolitan Transp. Authority* (39 Misc3d 1230(A) [Sup Ct, NY Co 2013] [Michael D. Stallman, J.]) where the court concluded that the defendant's admissions did not bar them from arguing that the plaintiff failed to serve a timely notice of claim and granted the defendant's motion to dismiss accordingly.

The *Lee* defendants admitted to the fact, as is the case here, that they received "a certain paper," and to the fact that "a certain paper" was received within 90 days after the alleged occurrence. The *Lee* court found:

> Defendants are bound by those facts. Therefore, *they cannot argue that a paper purporting to be a notice of claim was not timely served*. However, defendants did not admit that the paper they received was a notice of claim ... The issue of whether a 'certain piece of paper' that defendants received complied with notice of claim requirements is not a fact. Defendants should not be barred from raising the legal argument that what they admittedly received was not a legally sufficient notice of claim. The legal argument does not indirectly contradict either the admitted existence of the document, or the admission that such a document was timely received." (*Id.* at 13) (emphasis added)

The *Lee* defendants were not arguing that they had not received a timely notice of claim, as is the case here. Rather, in *Lee*, the defendants argued that the *contents* of the "paper purporting to be a notice of claim" did not contain all the information required under GML § 50-e.

A crucial requirement of a judicial admission is that "the statement must be one of fact" (*Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012]). Here, Defendants have admitted to the fact of receiving "a certain paper," and to the fact that "a certain paper" was received within 90 days after the alleged occurrence. In their motion, Defendants argue that their answer does **not** admit that the paper received was in fact a

notice of claim and does **not** admit that Plaintiff complied with the notice of claim requirements. However, they do not dispute that they received a "certain paper purporting to be a notice of claim," nor do they claim that the document was deficient in any respect. Neither did Defendants seek leave to amend their answer to eliminate the admission. Therefore, the court must conclude that Defendants' answer admitted timely receipt of a document purporting to be a notice of claim and that they are bound by this formal judicial admission which is dispositive here.

In view of the foregoing, Defendants' motion for an order pursuant to CPLR § 3211(a)(7) to dismiss Plaintiff's complaint for failure to file a timely notice of claim is denied.

Dated: December 11, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
APPLICATION:		**GRANTED**	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
		SETTLE ORDER			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**