

Matter of Soto v New York City Hous. Auth.
2020 NY Slip Op 31230(U)
April 28, 2020
Supreme Court, Kings County
Docket Number: 520754/2019
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of April 2020

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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In the Matter of the Application of MARGARITA SOTO,
Petitioner,

Index No. 520754/2019

- against -

DECISION AND ORDER

To file a Notice of Claim against
NEW YORK CITY HOUSING AUTHORITY

Respondent.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2
Answers/Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, petitioner MARGARITA SOTO moves by order to show cause for an order, pursuant to General Municipal Law § 50-e (5), permitting service of a late notice of claim, previously served upon respondent,

NEW YORK CITY HOUSING AUTHORITY (hereinafter NYCHA) deemed timely served, *nunc pro tunc*. NYCHA opposes the application.

Background

This is an action for personal injuries allegedly sustained by the petitioner as a result of a trip and fall at the premises known as 422 Blake Avenue, Brooklyn, New York. Petitioner alleges that on December 4, 2018, she was caused to trip and fall while descending the staircase in stairwell 1B, from the second floor to the first floor in the subject premises. This stairway allegedly contained broken steps and was in a state of disrepair. On September 11, 2018, petitioner served a Notice of Claim upon the respondent. The notice alleges that the accident occurred because of a “chipped, depressed, hazardous, unlevel, irregular . . .” step on the staircase. The instant petition was filed on September 20, 2019.

In support of her order to show cause, petitioner submits her affidavit, wherein she alleges that after her accident, she reported it to Lisa Kenner. According to petitioner, Ms. Kenner stated that she was a representative, employee or agent of NYCHA. The affidavit further states that on or about December 10, 2018, petitioner retained an attorney to pursue a personal injury action against NYCHA. However, on or about December 15, 2018, petitioner was advised that the attorneys were “rejecting” her case.

Petitioner retained the Hamel Law Firm on or about July 16, 2019. She explained to her attorneys that she was unaware of the notice of claim filing requirements, but that she had reported the accident to one of NYCHA’s

representatives. A Notice of Claim was served on NYCHA on September 11, 2019, approximately two months after petitioner retained new counsel. Petitioner argues that the instant notice of claim was only “minorly late; i.e. approximately six (6) months” and that NYCHA was not prejudiced by the late filing, as the subject steps are available for inspection. Further, petitioner contends, the subject steps are in the same condition as when the accident occurred.

In opposition, respondent NYCHA argues that petitioner has failed to offer a reasonable excuse for her failure to timely serve the Notice of Claim; as the only excuse proffered was that she was unaware of the service requirement. In addition respondent argues, petitioner fails to explain why her initial attorneys rejected her case, why she waited an additional eight months to retain new counsel and why that counsel waited an additional two months to bring this application.

NYCHA next argues that it did not acquire actual knowledge of the facts constituting petitioner’s claim within a reasonable time after the happening of the accident. In support, NYCHA attaches affidavits from Lisa Kenner and Dorothy Hitt. Ms. Kenner’s affidavit states she is a tenant of 422 Blake Avenue, Apt 5G, Brooklyn and is the president of the Tenant’s Association. She denies that she is or ever was employed by NYCHA and claims that she never represented to anyone that she was an employee, agent or representative of NYCHA. Additionally, Ms. Kenner denies ever receiving a report from petitioner or anyone else regarding this incident.

Ms. Hitt has been employed by NYCHA as a housing assistant at the Van Dyke Houses. She has been assigned to 422 Blake Avenue, Brooklyn, NY since 2014. She states she never observed any defective condition on the subject stairway, and she never received any complaints regarding the condition of the stairway.

Ms. Hitt further claims she never received any reports from Ms. Kenner or anyone else regarding petitioner's alleged accident; and, had she received such a report, she would have made an entry in the petitioner's tenant folder, which she did not. The affidavit goes on to state that Ms. Kenner is not an employee, agent or representative for NYCHA.

In reply, petitioner again argues that NYCHA is not prejudiced by the late filing of the notice of claim, as the subject stairway is available for inspection and is in the same condition as when petitioner's accident occurred. Petitioner, further, argues that NYCHA has not been deprived of their opportunity to conduct an adequate examination of the circumstances surrounding petitioner's accident.

Discussion

General Municipal Law § 50-e (5) states in pertinent part that:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state . . . In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a

reasonable time thereafter . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

When ruling upon a motion for leave to serve a late notice of claim, nunc pro tunc, the court may consider, among other things: “(1) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter; (2) [whether] the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim and for the subsequent delay in seeking leave to serve late notice . . . and (3) whether the public corporation was substantially prejudiced by the delay” (*Coronel v New Jersey Transit Corp*, 173 AD3d 828, 829 [2d Dept 2019]) (citations omitted). “While the presence or the absence of any one of the factors is not necessarily determinative . . . whether the public corporation had actual knowledge of the essential facts constituting the claim is of great importance” (*Tejada v City of New York*, 161 AD3d 876, 877 [2d Dept 2018], citing *Matter of Gonzalez v City of New York* 60 AD3d 1058, 1059 [2d Dept 2009]).

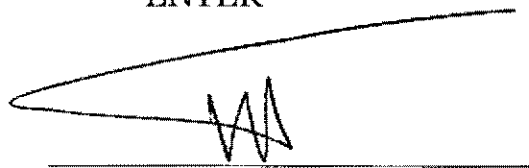
The evidence submitted by petitioner has failed to establish that NYCHA had actual knowledge of the essential facts constituting petitioner’s claim. Although petitioner stated in her affidavit that she reported her accident to a NYCHA representative, Ms. Kenner has submitted an affidavit stating that she was never made aware of petitioner’s accident and that at no time was she an employee, agent or representative of NYCHA. Further, Dorothy Hitt, confirmed that Ms. Kenner is not a NYCHA employee, agent or representative and that she never received

notification of the petitioner's accident (see *Maggio v City of New York*, 137 AD3d 1282 [2d Dept 2016]).

Furthermore, petitioner has failed to demonstrate a reasonable excuse for failing to timely file her Notice of Claim. Petitioner's explanation that she was unaware of the Notice of Claim filing requirements does not constitute a reasonable excuse (*Matter of Islam v City of New York*, 164 AD3d 672, 674 [2d Dept 2018]; citing *Matter of Bush v City of New York*, 76 AD3d 628 [2d Dept 2010]). Lastly, petitioner has failed to demonstrate a reasonable excuse for the subsequent delay in filing this petition after new counsel was retained (*Ma v New York City Health and Hospitals Corp.*, 153 AD 3d 529 [2d Dept 2017], citing *Matter of Maggio*, 137 AD3d at 1283).

Accordingly, petitioner's order to show cause to permit service of a late notice of claim, nunc pro tunc is denied. The petition is dismissed. This constitutes the decision and order of the court.

ENTER

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a series of vertical and diagonal lines, resembling a stylized 'J' or 'S'.

J. S. C