

**Sosnicki v New York City Sch. Constr. Auth.**

2020 NY Slip Op 31977(U)

May 7, 2020

Supreme Court, Queens County

Docket Number: 705502/2017

Judge: Lourdes M. Ventura

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**FILED**

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY **5/13/2020**

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

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MARIAN SOSNICKI,  
Plaintiff,

Index  
Number: 705502/2017

**COUNTY CLERK  
QUEENS COUNTY**

-against-

Motion  
Date: November 18, 2019

THE NEW YORK CITY SCHOOL  
CONSTRUCTION AUTHORITY,  
Defendant.

Motion  
Seq. No.: 2

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The following numbered papers read on this Motion by Defendant the New York City School Construction Authority, for an Order: pursuant to CPLR 3212 dismissing Plaintiff's Complaint against them and Plaintiff cross-moves for an Order pursuant to CPLR 2001 deeming Plaintiff's fully executed Notice of Claim fully served as required by Municipal Law 50(e) and for such other and further relief this Court may deem just and proper.

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Upon the foregoing papers, it is Ordered that Defendant's Motion and Plaintiff's Cross-Motion is determined as follows:

The instant case arises from a tort action whereby Plaintiff alleges that she suffered severe injuries when she tripped and fell as a result of Defendant's failure to construct, place, or operate tools and/or material storage. The incident is alleged to have occurred at P.S. 148K, which is located at 185 Ellery Street, Brooklyn, New York (hereinafter "subject property"), in the County of Kings. It is further alleged that Defendant owns the subject property.

The case was commenced by Summons and Verified Complaint filed under index number 514284/2016, in the County of Kings. On February 3, 2017, the Court granted Defendant's Motion for a change of venue and Ordered that the instant case be transferred to Queens County. On April 26, 2017, the Court issued a notice transferring the instant case to Queens County and assigned index number 705502/2017 to the instant case.

Defendant moves, *inter alia* pursuant to CPLR 3212 for summary judgment and asserts that Plaintiff never actually served a Notice of Claim upon it as required under New York General Municipal law ("NYGML") § 50-e. In support of Defendant's Motion, it submits the

following evidence: Safety inspection report, Order to Show Cause dated March 15, 2016, Summon and Verified Complaint filed in the instant case, Defendant's Answer, Verified Bill of Particulars, Plaintiff's EBT transcript, Teodoro Mauricio EBT transcript, Court Order dated July 23, 2019, and Notice to Admit.

Plaintiff cross-moves pursuant to CPLR 2001 and requests that this Court deem the Notice of Claim attached to the Order to Show Cause dated March 15, 2016 timely served upon Defendant and in compliance with NYGML §50-e. In support of Plaintiff's Cross-Motion, she submits the following evidence: an Order rendered by the Honorable Carolyn E. Wade and dated July 12, 2016 and Order to Show Cause dated March 15, 2016.

The pertinent portions of CPLR 2001 reads as follows:

"At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid."

New York Public Authority Law ("NYPAL") § 1744 governs claims and actions against the authority and the pertinent portions of NYPAL § 1744, reads as follows:

"1. Except in an action for wrongful death, no action or proceeding shall be prosecuted or maintained against the authority, or any member, officer, agent, or employee thereof, for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of the authority or of any such member, officer, agent or employee thereof, or for any other alleged tort of the authority or of such member, officer, agency or employee thereof, unless (i) it shall appear by and as an allegation in the complaint or moving papers that a notice of claim shall have been made and served upon the authority, within the time limit prescribed by and in compliance with *section fifty-e of the general municipal law,...*"

Pursuant to NYGML § 50-e(1)(a), "the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; ...". Thus, timely service of a notice of claim is a condition precedent to the commencement of a tort action against the Authority (*see NYGML § 50-e(1)(a); NYPAL § 1744*). NYGML § 50-e(5) permits a court to extend the time to serve a notice of claim.

Here, the instant case was in Kings County, when Plaintiff filed an Order to Show Cause dated March 15, 2016 seeking leave to serve a late Notice of Claim on Defendant pursuant to NYGML 50-e(5). On July 12, 2016, Honorable Carolyn E. Wade issued a written Order, which in pertinent part reads as follows: "Petitioner, Sosnicki's OSC for leave to file a late Notice of Claim is granted." Plaintiff attaches the aforementioned Order to Show Cause and Order to her moving papers as Exhibit "A". The Court notes that Plaintiff's Order to Show Cause only sought "leave to serve a late Notice of Claim" and as Plaintiff concedes in her Cross-Motion,

she did not seek to deem the proposed Notice of Claim attached to the Order to Show Cause timely served nunc pro tunc upon Defendant in the Order to Show Cause.

The Court finds that under these circumstances, Plaintiff was required to file a late Notice of Claim on Defendant. However, Plaintiff did not file a late Notice of Claim even though Plaintiff was granted leave to do so by written Order dated July 12, 2016.

Plaintiff now moves this Court to deem the Notice of Claim attached to the Order to Show Cause dated March 15, 2016 timely served upon Defendant. However, Plaintiff's Cross-Motion failed to attach the actual Notice of Claim that Plaintiff seeks to have this Court deem timely served. See *Grasso v. Nassau Cty.*, 109 A.D.3d 579 (2013) (Failure to submit proposed Notice of Claim with the Cross Motion was sufficient justification by itself to deny the Cross Motion).

Furthermore, Plaintiff moves pursuant to CPLR 2001 and relies on *Grskovic v. Holmes*, 111 A.D.3d 234, 241, 972 N.Y.S.2d 650 (2013) in support of her moving papers. The Court notes that, the underlying facts of the instant case and the underlying facts of *Grskovic v. Holmes* are completely distinguishable, in that *Grskovic v. Holmes* involved the error of counsel who used a "training" version of an e-filing system, rather than the "live" system, was held to be excusable since counsel was unfamiliar with the system and the training system provided confirmation documents that did not make it obvious that they were not actual confirmation documents. In contrast, the instant case involves a Plaintiff who did not serve a timely Notice of Claim despite the fact that the Court granted Plaintiff's request to file a late Notice of Claim and Plaintiff now seeks to deem the Notice of Claim attached to the Order to Show Cause dated March 15, 2016 timely served upon Defendant.

In addition, the incident which gave rise to the instant case occurred on or about November 4, 2014<sup>1</sup> and Plaintiff's Cross-Motion was filed on December 2, 2019 five years after said incident. Pursuant to General Municipal Law § 50-i(1), leave to file a late Notice of Claim may be made before or after the commencement of the action, but *not more than one year and ninety days after the happening of the event upon which the claim is based*, unless the statute has been tolled. Emphasis added. (see *Pierson v. City of New York*, 56 N.Y.2d 950, 954, 439 N.E.2d 331, 332 (1982); see also General Municipal Law, § 50-i, subd. 1; *Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 262-263, 434 N.Y.S.2d 138, 414 N.E.2d 639.

The Second Department, Appellate Division in *Grskovic v. Holmes* has clearly held that "legislative history makes clear that although the purpose of the 2007 amendment was to 'fully foreclose dismissal of actions for technical, non-prejudicial defects,' *it was not intended to 'excuse a complete failure to file within the statute of limitations.'*" Emphasis added. *Grskovic v. Holmes*, 111 A.D.3d 234, 241, 972 N.Y.S.2d 650 (2013) citing (Senate Introducer's Mem in Support, Bill Jacket, L 2007, ch 529 at 5). Here, Plaintiff does not allege that the statute has been tolled and it is clear that Defendant's Cross-Motion was filed well after the one year and ninety days after the happening of the event upon which the claim was based. Moreover, Plaintiff's Cross-Motion fails to provide a reasonable excuse for failing to actually file a late Notice of

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<sup>1</sup> The date in which the incident occurred is not disputed by the parties.

Claim on Defendant. See *Grasso v. Nassau Cty.*, 109 A.D.3d 579 (2013). See also *Matter of Hill v New York City Tr. Auth.*, 68 AD3d 866, 867 (2009); *Matter of Smith v Baldwin Union Free School Dist.*, 63 AD3d 1078, 1079 (2009); *Matter of Deegan v City of New York*, 227 AD2d 620 (1996).

Even arguendo, that this Court deems Plaintiff's Cross-Motion a renewal of her original application made by Order to Show Cause dated March 15, 2016 seeking leave to serve a late Notice of Claim on Defendant. It is well established that "[a]n untimely renewal motion does not relate back to the date when the originally timely motion was made *Goffredo v. City of New York*, 33 A.D.3d 346, 830 N.Y.S.2d 11 (2006) citing *Matter of Dominguez v. New York City Health & Hosps., Corp.*, 178 A.D.2d 186, 576 N.Y.S.2d 872 [1991]; *Matter of Asaro v. City of New York*, 167 A.D.2d 130, 561 N.Y.S.2d 218 [1990], *lv. dismissed in part and denied in part* 77 N.Y.2d 956, 570 N.Y.S.2d 486, 573 N.E.2d 574 [1991]. Acceptance of the 'relation-back' doctrine in this regard is inappropriate because "the statute of limitations would have no practical effect for it would impose no time constraint on seeking renewal" *Goffredo v. City of New York*, 33 A.D.3d 346, 348, 830 N.Y.S.2d 11, 13 (2006) quoting (*Matter of Rieara v. N.Y. Dept. Of Parks & Recreation*, 156 A.D.2d 206, 207, 548 N.Y.S.2d 466 [1989]).

Here, Plaintiff's Cross-Motion was filed on December 2, 2019, almost three and half years after she filed the Order to Show Cause dated March 15, 2016. More notably, Plaintiff's Cross-Motion was made after the expiration of the applicable Statute of Limitations and as a result, Courts lack the requisite competence or power to even entertain a motion to serve a late Notice of Claim if the application is made after the expiration of applicable Statute of Limitations (see *Adams v. City of New York*, 180 A.D.2d 629, 579 N.Y.S.2d 170 [1992]) (Motion for renewal of application for leave to serve late notice of claim against city was not made until after expiration of applicable Statute of Limitations, and thus, it was untimely as matter of law and Supreme Court had no authority to exercise its discretion to grant motion). Therefore, Plaintiff's Cross-Motion is untimely as a matter of law and this Court does not have authority to exercise its discretion to grant the Motion (see *Adams v. City of New York*, 180 A.D.2d 629, 630, 579 N.Y.S.2d 170 (1992)).

Based on the foregoing Defendant's Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(7) is granted on the ground that Plaintiff failed to serve Defendant with a Notice of Claim as required by NYGML § 50-e(1)(a) and as a result Defendant's remaining contentions are rendered moot. Plaintiff's Cross-Motion is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: May 7, 2020

**FILED**

**5/13/2020**

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**COUNTY CLERK  
QUEENS COUNTY**

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LOURDES M. VENTURA, J.S.C.