

**Dibenedetto v Port Auth. of N.Y. & N.J.**

2020 NY Slip Op 32964(U)

September 9, 2020

Supreme Court, New York County

Docket Number: 153976/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

-----X

JESSE DIBENEDETTO

Petitioner,

- v -

PORT AUTHORITY OF NEW YORK & NEW JERSEY,

Respondent.

-----X

INDEX NO. 153976/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12 were read on this motion to/for LEAVE TO FILE.

Petitioner Jesse DiBenedetto brings this Petition pursuant to CPLR 217-A and General Municipal Law (“GML”) § 50-e [5] to serve and file a late notice of claim, *nunc pro tunc*, against Respondent Port Authority of New York and New Jersey (“Respondent” or “Port Authority”). Petitioner alleges that he was injured due to Respondent’s negligence while he was employed by a third party at a construction site on April 20, 2018. Respondent opposes the Petition. This court has already denied identical relief in a related proceeding between the same parties, filed under index number 154017/2019, finding that the court lacked subject matter jurisdiction; Petitioner now attempts to cure that jurisdictional defect by seeking leave to file a notice of claim. For the following reasons, the application is denied and the Petition is dismissed.

**BACKGROUND**

On April 20, 2018, Petitioner was employed as a laborer for Tishman Construction at 175 Greenwich Street, a site owned by Respondent. Petitioner and approximately 15 other employees were attempting to move a large crate weighing 3000 pounds by using two power jacks in tandem.

Petitioner alleges that due to Respondent's negligence, the crate "shifted and stuck" him, causing serious injury. (NYSCEF Doc No. 1 at ¶ 6.)

Petitioner initially retained the Law Offices of Polsky, Shouldice & Rosen, P.C. in June 2018 to represent him in the prior action, and subsequently retained the Gucciardo Law Firm in March 2019. There is no evidence that former counsel filed a timely notice of claim; rather, the record indicates that Petitioner's current counsel attempted to file a notice of claim on March 19, 2019. (NYSCEF Doc No. 3.)

Petitioner commenced the instant special proceeding on April 17, 2019, however, as noted, he also commenced a related action in this court on April 18, 2019, entitled *Jesse DiBenedetto v Port Authority of New York/New Jersey, Permasteelisa North America Corp., Ornamental Installation Specialists, Inc., and Paramount Construction Group, LLC*, under index number 154017/2019. In that action, this court granted Port Authority's motion to dismiss on August 8, 2019, finding that Petitioner failed to timely file a notice of claim pursuant to New York Unconsolidated Laws § 7107. (NYSCEF Doc No. 26, index No. 154017/2019.)

### DISCUSSION

"As an agency of two sovereign states, Defendant cannot be sued without a waiver of sovereign immunity. Under New York law, consent to suit is granted upon, inter alia, the condition that a notice of claim required by McKinney's Unconsolidated Laws of NY § 7107 shall be served upon Defendant by Plaintiff at least sixty (60) days before such suit." (*Belmosa v Port Auth. of New York & New Jersey*, 2018 WL 3396633, \*2 [Sup Ct, NY County 2018], citing *Matter of New York City Asbestos Litig.*, 24 NY3d 275, 278-79 [2014].) "Absent compliance with the notice of claim requirement, the court lacks subject matter jurisdiction." (*Barrett v Port Auth. of New York*

& *New Jersey*, 2018 WL 6838751, \*2 [Sup Ct, NY County 2018], citing *Belpasso v Port Auth. of New York & New Jersey*, 103 AD3d 562 [1st Dept 2013].)

Petitioner argues that Unconsolidated Laws § 7107 only applies to “incidents occurring prior to June 2013” and that, here, CPLR 217-a applies instead. CPLR 217-a reads that:

every action for damages or injuries ... against any political subdivision of the state, or any instrumentality or agency of the state or a political subdivision, any public authority or any public benefit corporation that is entitled to receive a notice of claim as a condition precedent to commencement of an action, shall not be commenced unless a notice of claim shall have been served on such governmental entity within the time limit established by section fifty-e of the general municipal law, and any such action must be commenced in compliance with all the requirements of section fifty-e[.]

Further, Petitioner argues that CPLR 217-a’s direct incorporation of GML § 50-e gives this court discretion to grant Petitioner leave to file a late notice of claim after considering “whether the public corporation ... acquired actual knowledge of the essential facts constituting the claim within [90 days] [and considering] all other relevant facts and circumstances.” (GML § 50-e.)


However, “Section 50-e [of the General Municipal Law] ... applies exclusively to municipal corporations, and has no application to the Port Authority, a bistate agency.” (*Luciano v Fanberg Realty Co.*, 102 AD2d 94, 97 [1st Dept 1984].) The text of CPLR 217-a indicates that it is only meant to apply to instrumentalities of “the state [of New York]” and, in any event, it does not take into account the unique bi-state nature of the Respondent.

Here, the Petition must be dismissed for failure to comply with the statutory condition precedent of serving a notice of claim 60 days before commencing the instant suit. Accordingly, the court lacks subject matter jurisdiction and the proceeding must be dismissed. (*Lyons v Port Auth. of New York & New Jersey*, 228 AD2d 250, 251 [1st Dept 1996].)

Accordingly, it is hereby

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent, as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>09/09/20</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE