

Barrella v Port Auth. of N.Y. & N.J.

2020 NY Slip Op 33657(U)

September 16, 2020

Supreme Court, Queens County

Docket Number: 719080/19

Judge: Robert I. Caloras

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

-----X
FRANK BARRELLA, JR,
Plaintiffs,

Index No. 719080/19
Motion Date: 9/3/20
Seq. No. 1

-against-

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, RREEF AMERICA REIT II CORP, MMMM6 NEW YORK, A MARYLAND CORPORATION, SMALL PACKAGE EXPRESS INC., TRANSPORT MARI, EXPRESS AIR FREIGHT UNLIMITED INC, SKYLINE FREIGHT INC, and TELCO TRADING CORPORATION,
Defendants.

FILED

9/23/2020
10:41 AM

COUNTY CLERK
QUEENS COUNTY

-----X
The following papers numbered E5-E23 read on this motion by Defendant THE PORT AUTHORITY OF NEW YORK & NEW JERSEY (hereinafter, "Port Authority"), pursuant to CPLR 3211 (a)(l) on the grounds that dismissal is warranted because documentary evidence conclusively establishes a defense to the asserted claims as a matter of law and (a)(7) on the grounds that plaintiff failed to state a cause of action ; and cross-motion by Plaintiff for an Order: (1) Pursuant to General Municipal Law §50-e(6) for leave to file an Amended Notice of Claim; (2) Pursuant to CPLR Section 3025(b) granting leave to amend the Verified Complaint; or in the alternative (3) Pursuant to General Municipal Law §50-e(5) for leave to file a late Notice of Claim.

	PAPERS
	NUMBERED
Notice of Motion-Affirmation-Exhibits.....	E5-E12
Notice of X-Motion-Affirmations-Exhibits.....	E13-E20
Memo in Reply.....	E21-22
Affirmation in Reply.....	E23

Upon the foregoing papers it is ordered that this motion by Port Authority is granted and cross motion by Plaintiff is denied as follows:

According to the complaint, Plaintiff Frank Barrella, Jr., seeks to recover damages for personal injuries he allegedly sustained on February 27, 2019 when a malfunctioning cargo apparatus fell on his feet and legs at 147-20 184th Street, Cargo Building 151, Jamaica, New York 11431. Plaintiff subsequently served a Notice of Claim upon Port Authority, received on May 29, 2019, alleging he was injured while picking up cargo at or about the premises located at 147-20 184 Street, Jamaica, New York 11431. On November 11, 2019, the Summons and Complaint were filed with this Court. On January 23, 2019, the Port Authority received the Summons and Verified Complaint. Port Authority filed the instant motion on February 25, 2020,

claiming Plaintiff's Verified Complaint should be dismissed because it does not own, operate, maintain or control any portion of the property located at 147-20 184th Street Jamaica, New York 1143. Plaintiff has opposed this motion and cross-moved for leave to amend the Notice of Claim and Verified Complaint, or in the alternative, for leave to file a late Notice of Claim to reflect the correct accident location. Plaintiff concedes the location in his Notice of Claim and Verified Complaint, is not the address of the alleged accident and makes no claim that this address is owned by Port Authority. Port Authority has opposed Plaintiff's application on the grounds that since the Notice of Claim is admittedly deficient, this Court is deprived of subject matter jurisdiction and is unable to grant the relief sought by Plaintiff. The Court shall address Plaintiff's cross motion initially, as resolution of that motion shall determine Port Authority's motion.

Defendant Port Authority is a bi-state entity created in 1921 by a compact between New York and New Jersey and approved by Congress. (McKinney's Uncons Laws of NY § 6404 [Compact Between New York and New Jersey Creating Port Authority].) As an agency of the State, defendant Port Authority enjoys the same sovereign immunity as the State of New York. (Trippe v Port of N.Y. Auth., 14 NY2d 119, 123 [1964].)

The Port Authority, however, has consented to lawsuits against it on the condition that all actions against it are commenced within one year after the cause of action accrued, and if the action is one to recover damages, a notice of claim is served upon the Port Authority at least 60 days before such action is commenced. (McKinney's Uncons Laws of NY § 7107 [Suits Against The Port Authority]; Ofulue v Port Auth. of N.Y. & N.J., 307 AD2d 258, 259 [2d Dept 2003]; *see also* Estate of Pearlberg v Port Auth. of N.Y. & N.J., 210 AD2d 199, 200 [2d Dept 1994].) Compliance with the condition precedent of giving at least 60 days notice is mandatory and jurisdictional. (Lyons v Port Auth. of N.Y. & N.J., 228 AD2d 250, 251 [1st Dept 1996].) The failure to comply with this condition will result in the withdrawal of defendant's consent to the lawsuit and compels dismissal of the action for lack of subject matter jurisdiction. (Luciano v Fanberg Realty Co., 102 AD2d 94, 96, [1st Dept 1984].) Under (McKinney's Uncons Laws of NY § 7108, however, the court has the discretion to grant leave to serve a late notice of claim in situations involving the death, physical or mental incapacity of the claimant or where the claimant is a minor. (*see* DeCicco v Port Auth. of N.Y. & N.J., 277 AD2d 24, 24-25 [1st Dept 2000].)

In the case at bar, the Notice of Claim was timely served, however, it was materially defective since it contained an inaccurate address as the location of plaintiff's alleged accident. Thus, a sufficient notice of claim was not served at least 60 days before the action was commenced. Plaintiff asserts this error was due to unforeseen error and confusion and was not realized until the Port Authority moved to dismiss. Plaintiff claims a reasonable and good faith

excuse for failing to provide the accurate accident location and lack of prejudice to Port Authority leads to him being able to either amend the Notice of Claim or file a late Notice of Claim pursuant to General Municipal Law.

The court finds that Plaintiff's claims are insufficient to satisfy the requirements of the Unconsolidated Laws. The notice of claim requirement under Unconsolidated Laws § 7107, unlike that set forth in the General Municipal Law, is jurisdictional. (Luciano v Fanberg Realty Co., 102 AD2d at 97.) Indeed, a reasonable and good faith excuse for the error and lack of prejudice to the Port Authority do not excuse noncompliance with the notice of claim requirements of Unconsolidated Laws § 7107. (Luciano v Fanberg Realty Co., 102 AD2d at 97.) As noted above, Unconsolidated Laws § 7107 expressly limits the service of a late notice of claim to situations involving the death, physical incapacity or mental incapacity of the claimant, or where the claimant is a minor. Plaintiff does not claim to qualify under this provision.

Based on the above, there is no basis to allow the notice of claim to be amended or served late. As such, there is no reason to address the branch of the cross-motion seeking to amend the complaint. Consequently, the Plaintiff's cross motion is denied and Port Authority's motion to dismiss is granted.

Moreover, were this Court to consider the factors set forth in General Municipal Law § 50-e[5], under Uniform Notice of Claim Act, codified in CPLR 217-a, it would still deny the request to either amend the notice of claim or serve a late notice of claim. A petition for leave to amend a notice of claim may be granted provided that the error in the original notice of claim was made in good faith and the municipality has not been prejudiced thereby (*see* General Municipal Law § 50-e[6]; Matter of DiMattia v City of New York, 183 A.D.3d 823 [2d Dept 2020]). Here, Plaintiff has failed to demonstrate that the error in the original Notice of Claim regarding the location of the alleged accident was made in good faith. Plaintiff argues Port Authority cannot prove any bad faith to this error, that was made due to unforeseen error and confusion. These arguments do not satisfy GML § 50-e[6] since it is not for Port Authority to show bad faith, but for Plaintiff to meet his initial burden of showing good faith. Additionally, merely claiming an error was due to lack of prescience and confusion does not establish good faith (*Id.*)

Furthermore, Plaintiff has failed to meet his initial burden of demonstrating that Port Authority will not be prejudiced as a result of the delay in seeking leave to correct the accident location (*Id.* citations omitted). Plaintiff's reliance on the case of Kaminsky v. City of New York, 238 A.D.2d 380 (2d dept 1997) is misplaced. In that case, a trip and fall on a sidewalk, the Court found that the City was would not be prejudiced if the notice of claim was amended to reflect the correct address of the accident. This was based upon Plaintiff having given in his complaint the exact distance of the alleged sidewalk defect from the southwest corner of Ocean Parkway and

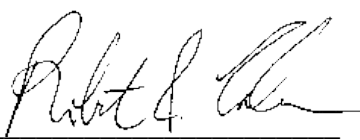
West 5th Street in Brooklyn, New York. Plaintiff had also annexed to the Complaint a photograph of the scene. The Court found that given this information and the photo, an investigator sent to the site could have ascertained the exact location of the alleged defect " 'with a modicum of effort'. Here, Plaintiff provided an inaccurate address and photos that give no similar clues to an investigator as to the correct address of the alleged accident. Furthermore, Plaintiff makes no claim that the malfunctioning cargo apparatus has not changed, thereby allowing Port Authority an opportunity to investigate. Accordingly, this Court denies Plaintiff's request to amend the notice of claim pursuant to the General Municipal Law (*supra*, Matter of DiMattia v City of New York).

In determining whether a motion should be granted for leave to serve a late notice of claim against a governmental authority, the court should consider, as key factors, whether there is a reasonable excuse for the delay in serving a notice of claim, whether the government authority acquired actual knowledge of the essential facts of the claim within the statutory period or within a reasonable time thereafter, whether the petitioner made an excusable error concerning the correct address of the accident, and whether the authority will be substantially prejudiced by the delay in its defense on the merits (see General Municipal Law § 50-e [5]; *See generally*, Kelly v City of New York, 153 A.D.3d 1388 [2d Dept 2017]).

Here, Plaintiff failed to provide a reasonable excuse for his failure to serve a timely sufficient notice of claim upon Port Authority. His excuse, that the use of the erroneous address was not discovered until Port Authority made the instant motion arose from an apparent lack of care and diligence in preparing the Complaint and Notice of Claim. Such is an unacceptable excuse. Matter of Lugo v GNP Brokerage, 185 A.D.3d 824 [2d Dept 2020]). Furthermore, as indicated above, Port Authority did not acquire timely, actual knowledge of the essential facts constituting Plaintiff's claim. While Port Authority was served with a timely notice of claim, this had the wrong address and no additional information regarding the correct location. Significantly, this wrong address was not owned or operated by Port Authority and thus would not provide sufficient facts constituting a claim against Port Authority. Finally, as indicated above, Plaintiff has failed to present sufficient proof that his delay in serving a sufficient notice of claim upon Port Authority would not substantially prejudice Port Authority in defending on the merits (*Id.*)

Accordingly, the motion by Port Authority to dismiss is granted and the cross-motion by Plaintiff is denied in its entirety.

Dated: September 16, 2020



ROBERT I. CALORAS, J.S.C.

FILED

**9/23/2020
10:41 AM**

**COUNTY CLERK
QUEENS COUNTY**