

<b>Pichardo v MTA Long Is. R.R.</b>
2020 NY Slip Op 33832(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 151881/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

SANDRA PICHARDO

Plaintiff,

- v -

MTA LONG ISLAND RAILROAD,

Defendant.

-----X

INDEX NO. 151881/2020
MOTION DATE 5/19/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, it is

ORDERED that Petitioner Sandra M. Pichardo's application by Order to Show Cause (Motion Seq. 001) is denied in its entirety; and it is further

ORDERED that the application by Respondent MTA Long Island Railroad to dismiss the petition is granted and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent MTA Long Island Railroad shall serve a copy of this order on all parties within twenty (20) days of entry.

## MEMORANDUM DECISION

In this trip and fall action, Petitioner Sandra M. Pichardo moves, by Order to Show Cause, for an order pursuant to General Municipal Law § 50(e)(5) granting Petitioner leave to file a late Notice of Claim upon Respondent MTA Long Island Rail Road and to also commence a lawsuit by serving her summons and complaint upon Respondent (motion seq. 001). Petitioner also asks that the Court hold the pre-condition of a 50-H hearing in abeyance within the statutory time period. Respondent opposes Petitioner's application in its entirety and moves for the dismissal of this proceeding.

### BACKGROUND

On March 12, 2019, Petitioner was descending down a staircase in the Amtrak New Jersey Transit concourse underground level when she allegedly fell due to a defective, raised, uneven tile slab, sustaining various injuries (NYSCEF doc No. 3, ¶ 3). Petitioner reported her accident to the Amtrak Police shortly after the alleged incident (*id.* at ¶ 5).

On June 12, 2019, Petitioner filed a personal injury claim with the office of the New York City Comptroller (*id.*).

On December 30, 2019, Petitioner retained counsel to represent her in this matter (*id.*, ¶ 7). Petitioner avers that until she met with counsel, she did not realize she had to file a claim against Respondent. Petitioner argues Respondent was made aware of the incident once she filed her report with the Amtrak Police (*id.*).

On December 23, 2019, Petitioner filed an amended Notice of Claim against Respondent (NYSCEF doc No. 15, ¶ 12)<sup>1</sup>.

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<sup>1</sup> Petitioner's papers do not address the discrepancy regarding why her amended Notice is dated prior to her meeting with counsel on December 30.

On February 13, 2020, Petitioner filed a Proposed Summons and Complaint against Respondent (NYSCEF doc No. 6). In the Proposed Verified Complaint, Petitioner verifies that she will be making a motion to serve a late Notice of Claim upon Respondent (*id.*, ¶ 5).

On February 26, 2020, Petitioner commenced the present proceeding before this Court.

In opposition, Respondent argues that that Petitioner fails to provide justification for her late amended Notice, that the Notice is deficient on its face, and that Respondent would be prejudiced by an order granting Petitioner the relief sought. Respondent therefore contends that the petition should be dismissed.

### DISCUSSION

#### *Untimeliness of the Amended Notice*

General Municipal Law Section 50 governs the rules for commencement of actions on public corporations. Respondent, which is owned by the public transportation agency Metropolitan Transportation Authority (MTA), is a public corporation subject to the statute.

Service of a notice of a claim or a notice of intent for a claim of negligence is required within 90 days of the date of the occurrence (*Martinez v City of New York*, 48 AD3d 257 [1<sup>st</sup> Dept. 2008]).

General Municipal Law Section 50-e 5 governs the application for leave to serve a late notice of claim on a public corporation such as Respondent. The statute provides, in relevant part:

"In determining whether to grant the extension, the court shall consider, in particulars, 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. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in service a notice of claim made an excusable error concerning the identity of

the public corporation against which the claim should be asserted ... and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."

When evaluating whether to permit service of a late notice of claim, the key factors for the Court to consider are whether the public corporation acquired actual notice of the claim within 90 days after the claim arose or within a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits, and whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame (*Dubowy v City of New York* , 305 AD2d 320 [1st Dept 2003]; *Barnes v New York City Housing Auth.* , 262 AD2d 46 [1st Dept 1999]).

Here, the Court finds that none of the relevant factors weigh in favor of granting Petitioner leave to serve her amended late Notice.

#### *Actual Notice to Respondent*

Respondent argues that it did not receive actual or constructive notice of the incident until December 2019, six months after the incident occurred. The First Department has held that "What satisfies the (General Municipal Law) statute is not knowledge of the wrong' but notice of the specific claim." (*Virella v City of New York*, 137 AD3d 705, 706 [1<sup>st</sup> Dept 2016], quoting *Matter of Sica v Board of Educ. Of City of N.Y.*, 226 AD2d 542, 543 [2d Dept.1996]). While Petitioner's papers speculate that Respondent was afforded notice once she filed her accident report with the Amtrak Police shortly after the incident, Amtrak is a separate corporation unrelated to Respondent and Petitioner has introduced no evidence suggesting that Respondent was made aware of the Amtrak Police accident report (NYSCEF doc No. 16 at 4). Petitioner's original claim was also solely against the City of New York and did not mention the staircase

location; it previously referred to the location as simply the “34<sup>th</sup> Street Subway” (*id.* at 5). The evidence thus suggests that the amended Notice, originally made in December 2019, is the first time Respondent was made aware of the accident that took place in March 2019.

#### *Reasonable Excuse*

The Court also finds that Petitioner has failed to offer a reasonable excuse for her delay in filing a Notice of Claim against Respondent. The only excuse offered by Petitioner is that she “did not know that a notice of claim needed to be filed with [Respondent] as I learned that they were responsible for the tile slab that I had my accident with” (NYSCEF doc No. 4, ¶ 5). Courts have held that ignorance of the law, lack of knowledge, and failure to perform timely, proper investigations on the part of plaintiffs and/or their counsel are not reasonable excuses that warrant a late Notice of Claim (*See Zapata v New York City Housing Authority*, 115 AD3d 606 [1<sup>st</sup> Dept 2014], *Todd v New York City Health and Hosps. Corp. Ofc. Of Legal Affairs, Claims Div.*, 129 AD3d 433 [1<sup>st</sup> Dept 2015]). Petitioner thus has not put forth a reasonable excuse for her failure to substantially comply with the statutory requirements. The Court further notes that Petitioner has not provided any explanation for why the present proceeding was not commenced until February 2020 despite the amended Notice of Claim being dated two months earlier (December 23, 2019).

#### *Prejudice*

Respondent argues that Petitioner has failed to demonstrate that Respondent has not been prejudiced by this delay, a matter for which she bears the burden of proof (*Newcomb v Middle Country Cent. School Dist.* 28 NY3d 455 [2016]). Petitioner does not aver that an accident report was provided to Respondent, or that she informed Respondent of the alleged condition on the subject staircase. Respondent’s Assistant Facility Maintenance Manager, Timothy Nordt, has

also submitted an affidavit warranting that Petitioner's proposed amended Notice of Claim does not allow him to identify the specific accident location, and he is therefore "not able to perform an investigation of the alleged accident location as the description is too general and could apply to multiple areas at Penn Station" (NYSCEF doc No. 17, ¶ 8).

Subsequent to Mr. Nordt's affidavit, Petitioner's counsel provided three undated black and white photographs of stairways in Penn Station (NYSCEF doc No. 19). Mr. Nordt submitted a supplementary affidavit in which he stated that the stairways in the photos appeared to be leased by Respondent, but as the photos were not dated, he could not state whether they fairly and accurately represent the condition of the stairways on the date of the alleged accident (NYSCEF doc No. 18, ¶ 9). The Court agrees with Respondent that as Petitioner has provided no evidence specifying the location accident beyond the undated photos, Respondent is prejudiced as its unable to perform a comprehensive investigation. The Court is also mindful of the fact that as twenty months have now passed since the alleged accident took place, the stairway in question is likely not in the same condition as at the time of the accident. Therefore, if Respondent were to perform an investigation at this juncture, the inspection would not allow Respondent to assess the condition of the stairway at the time of the alleged accident and thus would not alleviate the prejudice to Respondent caused by Petitioner's late Notice of Claim.

*Deficiencies of the Amended Notice*

Pursuant to General Municipal Law Section 50-e 2(2-3), a Notice of Claim: "shall set forth: (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose."

In addition to being untimely, Respondent argues that Petitioner's amended Notice is not in compliance with Section 50-e 2(2-3) given that the Notice does not detail the place of the

alleged accident with sufficient specificity. The “Place and Manner” section of Petitioner’s amended Notice simply states that Petitioner fell on an “Amtrak NJ Transit concourse underground level staircase, as a result of a broken, raised and defective pavement/tile slab square” (NYSCEF doc No. 5).

The purpose of the statutory notice of claim requirement is to afford the public corporation “an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available” (*Teresta v City of New York*, 304 NY 440, 443 [1952]). The statute is intended “to protect a public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently” (*Heiman v City of New York*, 85 AD2d 25, 27 [1<sup>st</sup> Dept 1982]) The statutory requirement regarding the place where the claim arose “is met where the notice describes the accident location with sufficient particularity to enable defendant to locate the alleged defect and to conduct a proper investigation of the site and otherwise assess the merits of plaintiff’s claim” (*Evers v City of New York*, 90 AD2d 786 [2<sup>nd</sup> Dept 1982]).

The Court thus agrees with Respondent that the amended Notice is not in compliance with the statutory requirements given that as discussed *supra*, the Notice does not offer any specificity regarding which staircase in which area of the concourse the incident occurred, meaning that Respondent is precluded from conducting a proper investigation of the specific accident location.

In sum, the Court concludes that Petitioner’s amended late Notice of Claim does not satisfy the requirements for leave to effect late service and is deficient on its face. In light of the determination that Petitioner’s application for leave to serve her amended late Notice of Claim is

denied, Petitioner’s application for a waiver of the pre-litigation hearing required for all claims against public corporations by General Municipal Law Section 50-h is moot.

Therefore, the Court finds that Petitioner’s application must be denied in its entirety and the petition is dismissed.

**CONCLUSION**

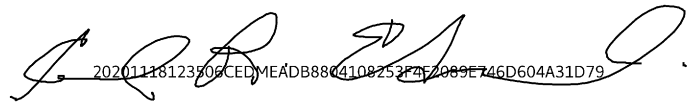
Accordingly, it is hereby

ORDERED that Petitioner Sandra M. Pichardo’s application by Order to Show Cause (Motion Seq. 001) is denied in its entirety; and it is further

ORDERED that the application by Respondent MTA Long Island Railroad to dismiss the petition is granted and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent MTA Long Island Railroad shall serve a copy of this order on all parties within twenty (20) days of entry.



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11/18/2020  
DATE

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CAROL R. EDMEAD, 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"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT