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| <b>Candelario v New York City Hous. Auth.</b>  |
| 2021 NY Slip Op 30681(U)   |
| March 8, 2021  |
| Supreme Court, Kings County  |
| Docket Number: 516684/2017   |
| Judge: Peter P. Sweeney  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 516684/2017  
Motion Date: 11-23-20  
Mot. Seq. No.: 1, 2

-----X  
ARNALDO CANDELARIO,

Plaintiff,

-against-

**DECISION/ORDER**

NEW YORK CITY HOUSING AUTHORITY,  
Defendant.

-----X

The following papers were read on these motions:

| <b>Papers:</b>  | <b>NYSEF Nos:</b> |
|---|-------------------|
| Notice of Motion/Order to Show Cause                        |                   |
| Affidavits/Affirmations/Exhibits/Memo of Law.....           | 1-24              |
| Answering Affirmations/Affidavits/Exhibits/Memo of Law..... | 25                |
| Reply Affirmations/Affidavits/Exhibits/Memo of Law.....     |                   |
| Other.....  |                   |

Upon the foregoing papers, the motions are decided as follows:

Plaintiff previously moved for leave to deem a late notice of claim timely served nunc pro tunc. For some reason, this motion has not been decided. The action was thereafter marked off calendar due to inactivity. Plaintiff now moves for an order restoring this matter to active status, compelling the deposition of the defendant and extending plaintiffs time to file their Note of Issue. Defendant opposes the motion.

The court will first address plaintiff’s motion for leave to deem the late notice of claim timely served nunc pro tunc. On January 13, 2017, the petitioner was allegedly injured when he tripped and fell on defective stairs between the 2<sup>nd</sup> and 3<sup>rd</sup> floors of an interior stairway designated “2A” located in the interior of a building owned by the New York City Housing Authority (“NYCHA”). The petitioner maintains that the same day as the accident, he reported the accident to Robert Illa, the project manager of the building. In opposition to the motion to

deem the late notice of claim timely served, Mr. Illa submitted an affidavit stating that he had no recollection of such a conversation but did not deny that such a conversation took place.

On March 15, 2017, well within 90 days of the accident, the petitioner served a notice of claim together with photographs of the defective condition naming NYCHA but mistakenly served the notice of claim on the New York City Comptroller at its office located at 100 Church Street, New York, New York. Petitioner's counsel states that when his office learned of the oversight, the notice of claim and accompanying photographs were immediately served on NYCHA at the correct address, albeit 63 days late.

In determining whether a petitioner should be granted leave to deem a late notice of claim timely served upon a public housing authority, the court should consider, as key factors, whether the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim, whether the public housing authority acquired actual knowledge of the essential facts of the claim within the statutory 90-day period or within a reasonable time thereafter, and whether the public housing authority will be substantially prejudiced by the delay in its defense on the merits (*see* General Municipal Law § 50-e[5]; Public Housing Law § 157[2]; *Matter of Ramos v. New York City Hous. Auth.*, 162 A.D.3d 884, 885, 80 N.Y.S.3d 85; *Robb v. New York City Hous. Auth.*, 71 A.D.2d 1000, 1001, 420 N.Y.S.2d 291).

“The petitioner's error in serving NYCHA at the Comptroller's Office and at an incorrect address was an excusable error since the petitioner's attorney promptly re-served NYCHA at its correct address after discovery of the mistake and followed up by commencing this proceeding” (*Brown v. New York City Hous. Auth.*, 182 A.D.3d 594, 120 N.Y.S.3d 807, 808, *citing Matter of Ruffino v. City of New York*, 57 A.D.3d 550, 551, 868 N.Y.S.2d 739; *Simmons v. New York City Hous. Auth.*, 161 A.D.2d 377, 555 N.Y.S.2d 325; *Robb v. New York City Hous. Auth.*, 71 A.D.2d

at 1001, 420 N.Y.S.2d 291). Furthermore, the petitioner met his initial burden of showing that NYCHA will not be substantially prejudiced by the late notice of claim, since the photographs taken by the petitioner depict the defect as it existed at the time of the accident (*id.*, citing *Matter of Newcomb v. Middle Country Sch. Dist.*, 28 N.Y.3d 455, 466–467, 45 N.Y.S.3d 895, 68 N.E.3d 714; *Matter of Mounsey v. City of New York*, 68 A.D.3d 998, 999, 891 N.Y.S.2d 440; *Matter of Ruffino v. City of New York*, 57 A.D.3d at 552, 868 N.Y.S.2d 739; *Barnes v. New York City Hous. Auth.*, 262 A.D.2d 46, 47, 691 N.Y.S.2d 463). The NYCHA failed to rebut the petitioner's initial showing as to lack of prejudice with a particularized evidentiary showing that the petitioner's delay in serving a notice of claim will prejudice it in its defense on the merits (*see Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d at 467, 68 N.E.3d 714; *Matter of Levin v. County of Westchester*, 91 A.D.3d 646, 647, 936 N.Y.S.2d 269).

While there is an issue as to whether the plaintiff actually told Mr. Illa about the accident, the petitioner demonstrated a reasonable excuse for the late filing of the notice of claim and that NYCHA would not be prejudiced if the application were granted. Under these circumstance and considering that NYCHA obtained actual knowledge of the claim only 63 days past the 90 day deadline, the application is granted. The Court notes that in *Brown v. New York City Hous. Auth.*, which is almost on all fours with this case, the fact that the petitioner did not prove that NYCHA received actual notice of the claim within the 90-day period was not fatal to the application.

Accordingly, it is hereby

**ORDERED** that the late notice of claim served on NYCHA is deemed timely served nunc pro tunc; it is further

**ORDERED** that the action is hereby restored to active status; and it is further

**ORDERED** that the parties are directed to appear in CCP on May 4, 2021 to schedule all remaining discovery.

This constitutes the decision and order of the court.

Dated: March 8, 2021



**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020