

Napoles v New York City Hous. Auth.

2022 NY Slip Op 30887(U)

March 17, 2022

Supreme Court, New York County

Docket Number: Index No. 154708/2021

Judge: William Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X	INDEX NO. <u>154708/2021</u>
FEDERICO NAPOLES	MOTION DATE <u>08/30/2021</u>
Petitioner,	MOTION SEQ. NO. <u>001</u>

- v -

NEW YORK CITY HOUSING AUTHORITY,
Respondent.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 9, 10, 11, 13, 15, 16, 17, 19, 20, 21, 22, 23

were read on this motion to/for LEAVE TO FILE

In this special proceeding, petitioner Fredierico Napoles seeks leave to file a late notice of claim and respondent New York City Housing Authority (NYCHA) opposes the application.¹

As alleged in the petition, petitioner tripped and fell “on a broken, cracked, uneven sidewalk”, on February 20, 2020 when returning to his residence in a building owned by respondent NYCHA. (NYSCEF Doc. No. 1, ¶¶ 4, 5). Petitioner seeks leave to file a proposed notice of claim, pursuant to General Municipal Law §50-e (5), claiming that he was unaware of the requirement to file a timely notice of claim, that his concerns surrounding Covid-19 prevented him from seeking legal advice and that NYCHA was aware of the details of the accident based on an Occurrence Report filed several days after the accident and was thus not prejudiced by the late filing. (NYSCEF Doc. Nos. 1, 2, 5, 7).

¹ NYCHA’s cross motion to dismiss the Summons and Complaint filed under Index No. 154765/2021 is not properly before the court. The Summons and Complaint filed under Index No. 154765/2021 is Pre-RJI and has not yet been assigned to a judge. The papers submitted in support and in opposition of the cross motion have not been considered by the court.

Respondent NYCHA opposes the application and claims that petitioner has failed to offer a reasonable excuse for the late filing and that it has suffered prejudice as it first received notice of the accident one year and 87 days after the occurrence, on May 18, 2021, when it received the petition.

DISCUSSION

To commence a tort action against a municipality or a public corporation, the claimant is required to serve a notice of claim within 90 days of the alleged injury (see GML§ 50-e(1)(a); *Jordan v. City of New York*, 41 A.D.3d 658, 659, 838 N.Y.S.2d 624 [2d Dept. 2007]). Pursuant to General Municipal Law § 50-e (5) the court has discretion to determine whether to allow filing of a late notice of claim. In making this determination, the court must consider the factors set forth in the statute which include: (1) whether the claimant had a reasonable excuse for the failure to timely serve a notice of claim; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter; and (3) whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits (GML§ 50-e(5); see also *Orozco v City of New York*, 200 AD3d 559-560 [1st Dept 2021]; *Perez ex rel. Torres v. New York City Health and Hospitals Corp*, 915 NYS2d 562 [1st Dept. 2011]; *Acosta v. City of New York*, 39 AD3d 629, 630, 834 NYS2d 267 [2d Dept. 2007]; *Schiffman v. City of New York*, 19 AD3d 206, 207, 797 N.Y.S.2d 450 [1st Dept. 2005]).

In considering these factors, none is dispositive and the court has discretion to consider all other relevant facts and circumstances. (see, *Pearson v. New York City Health and Hospitals Corp.*, 840 NYS2d 25 [1st Dept. 2007], *aff'd*, 10 NY3d 852 [2008]). The presence or absence of

any one factor is not determinative. (*Plaza v. New York Health & Hospitals Corp.*, 949 NYS2d 25 [1st Dept. 2012]; *Matter of Porcaro v. City of New York*, 72d 450 [1st Dept. 2005]).

Initially, the court notes that petitioner has failed to establish a reasonable excuse for the delay in filing a timely notice of claim. Petitioner's lack of knowledge of the time requirements and his concerns surrounding the pandemic, are not sufficient to establish a reasonable excuse on this record.

It is well-settled that petitioner's lack of knowledge of the time requirements of the notice of claim statute is an unacceptable excuse for failure to timely file a notice of claim. (*Casale v. City of New York*, 945 N.Y.S.2d 92 [1st Dept. 2012]; *Perez v. New York City Housing Authority*, 548 N.Y.S.2d 222 [1st Dept. 1986]). The fact that petitioner herein was allegedly unaware that the law imposed a requirement that a notice of claim be filed within 90 days of the date of the alleged accident is insufficient as a legal excuse. Moreover, while the court is certainly sympathetic to petitioner's concerns about Covid-19, petitioner did not attach any supporting medical records detailing medical appointments or treatments that would have prevented him from retaining or communicating with an attorney at any point during the 90 days following the alleged incident. Thus, petitioner's general concerns about Covid-19, does not excuse plaintiff's late filing.

GML § 50-e, however, "is not intended to operate as a device to frustrate the rights of individuals with legitimate claims" and as noted, the court may excuse a delay in filing a notice of claim, in its discretion, upon consideration of the statutory factors and all other relevant facts and circumstances. (see *Matter of Porcaro v City of New York*, 20 AD3d 357 [1st Dept 2005]). The statute is remedial in nature and as such should be liberally construed. (*Id.*; see also, *Moynihan v. New York City Health and Hospitals Corp.*, 993 NYS2d 260 [1st Dept. 201]);

Camacho v. City of New York, 589 NYS2d 421 [1st Dept.1992]). Thus, although petitioner has failed to support his contention of physical incapacitation due to Covid-19 with any medical evidence, the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim (*Harris v City of New York*, 297 AD2d 473, 473-474, 747 NYS2d 4 [2002], *lv denied* 99 NY2d 503, 783 NE2d 896, 753 NYS2d 806 [2002]), especially where, as here, respondent had the opportunity to investigate the petitioner's claims (see *Abbot v City of New York*, 271 AD2d 364, 707 NYS2d 88 [2000]), and where, as here, the respondent cannot show that it was prejudiced by the delay (*Weiss v City of New York*, 237 AD2d 212, 213, 655 NYS2d 34 [1997]).

The most important factor a court must consider in deciding such a motion is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the time specified. (see, *Padilla v Department of Education of City of New York*, 934 NYS2d 139 [1st Dept. 2011]). “Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by ... a delay.” (*Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006]).

Here, the essential facts of petitioner’s claim are set forth in the Occurrence Report annexed to the petition which specifies the date, time, and manner in which the occurrence is alleged to have happened. (NYSCEF Doc. No. 5). It provides that, “RESIDENT STATED THAT HE FELL FLAT ON HIS FACE COMING INTO THE BUILDING. WAS HELP UP BY NEIGHBORS AND HOUSING WORKER. AMBULANCE WAS CALLED. RESIDENT WAS KEPT IN HOSPITAL OVERNIGHT RELEASE AND WAS GIVEN PAIN MEDS”. (Id.). The Occurrence Report even notes the identity, address and telephone number of a witness to the incident and plainly indicates that petitioner fell while coming into the building.

The Occurrence Report was completed by NYCHA on February 26, 2020, six days after petitioner's accident and thus petitioner's proposed notice of claim supports the inference that respondent had actual notice of the claim within 90 days of its accrual (see *Matter of Gerzel v City of New York*, 117 AD2d 549, 550-551, 499 NYS2d 60 [1st Dept 1986]). In the verified petition, petitioner provides specific details related to his accident and demonstrates respondent's knowledge of the essential facts of petitioner's claims on the date of the accident. In paragraph 9, petitioner states: "The employees and management at the building had immediate notice of my injury on February 20, 2020. Several days after the accident I spoke to an employee of the building who prepared an 'occurrence report' for the Housing Authority (See Exhibit D). The report is on a form used by the Housing Authority. It states that I suffered a personal injury in a public area of the building. The location is described as 'UPACA Site 5'." (NYSCEF Doc. No. 1, ¶¶ 5, 9).

Respondent failed to rebut petitioner's demonstration of the absence of prejudice. Its conclusory assertions of prejudice, based on the delay in petitioner's serving the notice of claim, and its claim that it did not receive notice of essential facts as set forth in the Occurrence Report, are insufficient. Respondent attempts to explain away the essential facts set forth in the Occurrence Report by focusing on the section in the Occurrence Report which notes the location of the accident as the lobby of the building. However, as petitioner points out, its any shortcomings in the Occurrence Report are attributable to respondent which prepared the document and thus, respondent cannot now contend that such information precluded it from investigating the accident. Respondent does not aver that the witness and the "housing worker" identified in the Occurrence Report are unavailable, or that maintenance records related to the accident site are unavailable. (see *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448,

449, 915 NYS2d 562 [1st Dept 2011]; *Matter of Ansong v City of New York*, 308 AD2d 333, 334, 764 NYS2d 182 [1st Dept 2003]).

Once there has been an initial showing regarding the lack of substantial prejudice toward the public corporation or municipality, the public corporation or municipality is required to make a "particularized or persuasive showing that the delay caused them substantial prejudice" (*Lawton v Town of Orchard Park*, 138 AD3d 1428, 1428, 30 NYS3d 458 [4th Dept 2016]). A claim that a municipality is substantially prejudiced by a late notice of claim cannot be based on speculation or inference, but must be founded on record evidence (*Orozco v City of New York*, 200 AD3d 559-560 [1st Dept 2021], citing *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466, 45 N.Y.S.3d 895, 68 N.E.3d 714 [2016]). Respondent here has failed to make any such showing.

The court finds that the Occurrence Report submitted in support of petitioner's application seeking leave to file a late notice of claim, presents "some evidence or plausible argument that supports a finding of no substantial prejudice." (*Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466, 45 N.Y.S.3d 895, 68 N.E.3d 714 [2016], *reargument denied*, 29 N.Y.3d 963, 51 N.Y.S.3d 496, 73 N.E.3d 853 [2017]). As such, the passage of time, one year and 87 days, is not alone a sufficient basis to deny leave to file a late notice of claim as respondent has failed to demonstrate substantial prejudice because of petitioner's delay in filing the notice of claim.

Accordingly, the petition and application is granted and it is hereby,

ADJUDGED that the petition for leave to serve a late notice of claim is granted; and it is further

ORDERED that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

3/17/2022

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE