

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

2022 NY Slip Op 32156(U)

June 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 500871/2022

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27<sup>th</sup> day of June 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
ANAK HERIVEAUX,

Index No.: 500871/2022

*Petitioner,*

DECISION AND ORDER

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Motion Sequence #1

*Respondent.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

- Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed ..... 1-9, 11,
- Opposing Affidavits (Affirmations)..... 13-15,
- Reply Affidavits (Affirmations) .....

After a review of the papers and oral argument the Court finds as follows:

The instant action results from an incident that allegedly occurred on March 2, 2021. On that day, the Petitioner Anak Heriveaux (hereinafter “the Petitioner”) allegedly injured himself while “driving a baggage tug motorized vehicle under an open door/security gate when said open door/security gate without warning came down and struck said vehicle.” The Notice of Claim was served on September 23, 2021. The Petitioner stated therein that the incident occurred on March 3, 2021. The action was commenced on January 19, 2022. The Petitioner now moves by Petition to amend the Notice of Claim in order to reflect the date of March 2, 2021, rather than March 3, 2021.

The Port Authority of New York and New Jersey (hereinafter the “Respondent”) opposes the motion and argues that this motion should be treated as a motion seeking to file a late Notice of Claim because the change of date, which they contend is essential information for the Notice of Claim, makes the Notice of Claim defective and not subject to amendment or correction. The Respondent also argues that since the incident allegedly occurred on March 3, 2021, and the motion was made on January 11, 2022, the application is barred by the statute of limitations, which requires the notice of claim to be served at least sixty (60) days before the last date to commence suit.

Unconsolidated Laws §7107 provides in pertinent part that:

The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced.

Unconsolidated Laws §7108 provides in pertinent part that:

The notice of claim required by section seven hereof shall be in writing, sworn to by or on behalf of the claimant or claimants, and shall set forth (1) the name and post office address of each claimant and of his attorney, if any, (2) the nature of the claim, (3) the time when, the place where and the manner in which the claim arose, and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

The requirement to bring an action within one year under Unconsolidated Laws § 7107 is not a statute of limitations, it is a condition precedent to suit. The time to commence is based on the Port Authority’s consent and waiver of its sovereign immunity. *See Ofulue v. Port Auth. of New York & New Jersey*, 307 A.D.2d 258, 259, 761 N.Y.S.2d 685, 686 [2<sup>nd</sup> Dept, 2003]. “The former merely suspends the remedy provided by a right of action, but the latter *conditions* the existence of a right of action, thereby creating a substantive limitation on the right.” *Yonkers*

*Contracting Co. v. Port Auth. Trans Hudson Corp.*, 93 N.Y.2d 375, 378, 712 N.E.2d 678, 680 [2<sup>nd</sup> Dept, 1999]; *see also Goldstein v. New York State Urban Dev. Corp.*, 64 A.D.3d 168, 879 N.Y.S.2d 524, *aff'd*, 13 N.Y.3d 511, 921 N.E.2d 164 [2<sup>nd</sup> Dept, 2009].

Unconsolidated Laws § 7108 permits an application for leave to serve a late notice of claim only under a specific exception:

Where the claimant is a person under the age of eighteen years or is mentally or physically incapacitated and by reason of such disability no notice of claim is filed or suit, action or proceeding commenced within the time specified in section seven hereof, or where a person entitled to make a claim dies and by reason of his death no notice of claim is filed or suit, action or proceeding commenced within the time specified in section seven hereof then any court in which such suit, action or proceeding may be brought may in its discretion grant leave to serve the notice of claim and to commence the suit, action or proceeding within a reasonable time but in any event within three years after the cause of action accrued. Application for such leave must be made upon an affidavit showing the particular facts which caused the delay and shall be accompanied by a copy of the proposed notice of claim if such notice has not been served, and such application shall be made only upon notice to the port authority.

Upon analysis of the instant application, the Court finds that Petitioner has not provided any indication that the matter herein satisfies the limited time extension exception provided by Unconsolidated Laws § 7108. In the instant proceeding, the Petitioner served the Respondent with the notice of claim on September 23, 2021, at least sixty days before commencement of suit. However, unlike General Municipal Law § 50–e, which provides the Court with some limited discretion in permitting the filing of an amended notice of claim, there is less discretion in permitting the filing of an amended notice of claim under Unconsolidated Laws § 7107. *See Luciano v. Fanberg Realty Co.*, 102 AD2d 94, 96, 475 N.Y.S.2d 854, 856 [1<sup>st</sup> Dept 1984]. In the instant proceeding, the Petitioner has failed to show that he has satisfied the strict terms set forth by Unconsolidated Laws § 7108. Time is an essential element. As such, the proposed amended notice is a late notice. The original notice did not comply with the statute; therefore, it is a nullity,

and not subject to amendment. *See Unconsolidated Laws of N.Y. § 7108; Port Auth. of N.Y. & N.J. v. Barry*, 15 Misc. 3d 36, 38, 833 N.Y.S.2d 839, 840 [App. Term, 2<sup>nd</sup> and 11<sup>th</sup> Judicial Districts, 2007]. “Absent compliance with the notice of claim requirement, the court lacks subject matter jurisdiction.” *Belpasso v. Port Auth. of New York & New Jersey*, 103 A.D.3d 562, 959 N.Y.S.2d 442 [1<sup>st</sup> Dept, 2013]. Moreover, the issue of prejudice is academic. *See Luciano v. Fanberg Realty Co.*, 102 AD2d 94, 96, 475 N.Y.S.2d 854, 856 [1<sup>st</sup> Dept 1984]; *DeFilippis v. State*, 157 AD3d 826, 550 N.Y.S.2d 728 [2<sup>nd</sup> Dept 1990]. The statute serves to permit a claim notwithstanding the Respondent’s sovereign immunity; therefore, the requirements of the statute are a pre-condition to suit and must be strictly adhered to. As a result, the motion to amend the Notice of Claim as against Respondent Port Authority of New York and New Jersey is denied and the Petition is accordingly dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

The Petitioner’s motion (motion sequence #1) to file an amended Notice of Claim is denied and the Petition is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino, J.S.C.**

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 KINGS COUNTY CLERK