

Philbin v City of New York
2022 NY Slip Op 33434(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 151922/2022
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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STEPHEN PHILBIN,

Petitioner,

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING
AUTHORITY

Respondents.

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INDEX NO. 151922/2022

MOTION DATE 03/03/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for LEAVE TO FILE.

Pending before the Court is an order to show cause (“OTSC”) filed by Petitioner, Stephen Philbin, seeking an order granting leave to serve, after the statutory period, a Notice of Claim pursuant to General Municipal Law (“GML”) Section 50 (e)(5).

Petitioner alleges that on August 30, 2021, he was employed by WDF Inc. (“WDF”) as a carpenter journeyman, at the Jacob Riis housing project (“Jacob Riis”) located at 11-15 FDR Drive, New York, New York, when he allegedly sustained injuries while removing concrete from the exterior façade of the building. According to petitioner, WDF had been retained and hired by defendant City of New York (“City”) and defendant New York City Housing Authority (“NYCHA”) as the general contractor for Jacob Riis, and WDF was responsible for all the construction work on the project and did not subcontract this work to any other company. The construction project included the placement and installation of generators upon the rooftops of the Riis buildings, which were owned, operated, and controlled by the City and NYCHA.

Specifically, the petition alleges that petitioner was on the scaffold, which was not affixed, tied off or fastened, when it unexpectedly shifted, moved and became displaced as he was removing concrete causing him to feel “a pop” in his left shoulder and “crackling” sound which caused immediate, severe pain to his left shoulder. Petitioner asserts that a co-worker, Kristopher Mutula, was present and assisted him down off the scaffolding to the on-site carpenter’s trailer to get attention for his shoulder injury. After the scaffolding accident, WDF supervisors including “Tom” a Site Safety Representative; Cory Jones an additional Site Safety Representative and Supervisor; and John Rosciano were immediately informed that petitioner’s left shoulder was injured while working on the scaffold. Petitioner states that he was given ice for his shoulder, but it was subsequently decided that Site Safety Supervisor “Tom” would take petitioner to a nearby medical office for medical attention as the pain in his left shoulder persisted and his range of motion was impaired. Tom took petitioner to a City MD on Delancey Street in Manhattan.

Petitioner states that all three supervising representatives of WDF were present at the site when the accident occurred and were aware of his left shoulder injury while working on the scaffold. Petitioner further contends that the representatives reported the work-related left shoulder injury and opened a Worker’s Compensation claim including completing and submitting the application on petitioner’s behalf.

Petitioner did not contact a lawyer until December 15, 2021, after the 90-day period to file a notice of claim against the respondents had expired. Petitioner asserts that he was actively seeking medical help to diagnose what was wrong with his left shoulder which the city respondents were aware of. During this time, he did not fully return to performing his work duties as a carpenter and had limited activities because his left shoulder was in tremendous pain. After locating an orthopedic specialist that was experienced with such injuries who accepted Worker’s

Compensation, he progressed under his care and had to obtain Worker's Compensation approval for the requested MRI which took several weeks. Upon approval, the MRI was performed and on the subsequent visit with the specialist he learned of the true injury and that surgery was required. Now that he was fully informed of his medical condition and had a plan of action, he could focus on other issues including ascertaining whether he had a legal right to bring a lawsuit.

Petitioner asserts he has a viable claim against the city respondents under Labor Law Section 240(1) which imposes absolute liability on all owners, contractors, and their agents for any breach of duty which proximately causes an injury. Petitioner alleges that respondents' failure to provide adequate safety devices (such as a secured ladder to prevent shifting and movement) created the exact elevation hazard against which the law protects and one that was entirely foreseeable.

Respondent NYCHA argues in opposition that petitioner has failed to show that either NYCHA or its attorneys had actual knowledge of the essential facts within 90 days after the claim accrued or a reasonable time thereafter; that petitioner does not have a reasonable excuse for his failure to serve a timely notice of claim; and that NYCHA has been substantially prejudiced by the delay in reporting the claim.

CONCLUSIONS OF LAW

Pursuant to General Municipal Law § 50 (e) (5) the court has discretion to either grant or deny leave to serve a late notice of claim (*see Matter of Porcaro v. City of New York*, 20 A.D.3d 357 [2005]; *Matter of Dubowy v. City of New York*, 305 A.D.2d 320 [2003]). Some of the key factors to be considered by the court when exercising its discretion are: whether the petitioner has demonstrated a reasonable excuse for failing to file the notice of claim within the statutory time frame; whether the public corporation acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter; and whether the delay would substantially prejudice the municipality in defending on the merits (*see Powell v. City of New York*, 32 A.D.3d 227 [2006]; *Matter of Lodati v. City of New York*, 303 A.D.2d 406 [2003]).

In its opposition, NYCHA argues that it did not receive actual knowledge of the essential facts of the claim within the 90-day period and first learned of the claim after receiving the notice of claim on March 11, 2022. NYCHA argues that it is not in possession of an accident report concerning the incident and that petitioner's application does not show that NYCHA acquired actual knowledge of the facts.

In addition, NYCHA argues that even if it had knowledge of the incident, which it denies, such knowledge does not negate petitioner's requirement to file a notice of claim. Furthermore, NYCHA argues that the delay has prejudiced NYCHA's ability to examine the assembled scaffold, as the individuals petitioner alleges were informed about the incident, were employees of WDF and not employees of NYCHA. In support of its argument, NYCHA submitted the sworn affidavit of Property Manager Kassandra Bostick, (NYSCEF Doc No. 18), in which she avers that, ordinarily, she would have received an e-mail about any incidents, but she did not receive any information from WDF or the construction manager concerning petitioner's alleged incident.

Labor Law § 240(1), commonly referred to as the “scaffold law,” provides, in relevant part:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) “imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury” (*Gordon v. Eastern Ry. Suppl*, 82 N.Y.2d 555, 559 [1993]). The statutory duty imposed by this strict liability provision is “nondelegable” and an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 [1991]).

Here, petitioner was injured while working at the Jacob Riis houses, which petitioner contends are owned and operated by defendants the City of New York and NYCHA.

In its motion, the City argues that it was not the owner or operator of the Jacob Riis Projects and submits the sworn affidavit of David Schloss a title examiner for the New York City Law Department (NYSCEF Doc No. 13). While the affidavit denies City ownership of the property, it makes no mention of the relationship, if any, between the City and the contractor WDF. Importantly, in their opposition NYCHA does not concede that it owns the property or that the City is not a proper party and such cannot be determined on this record. As to the respondents’ claims on the issue of notice, this court finds these arguments to be unavailing.

First, it is undisputed that WDF was a general contractor for whom petitioner was working at Jacob Riis. WDF had three supervisors present including two Site Safety supervisors on the date of the accident who directly assisted petitioner with his medical injury including taking him for medical assistance and subsequently completing and submitting the Worker’s Compensation


application on his behalf. The Supervisors had access to petitioner, witnesses and the scaffolding on the date of the incident when memories were fresh and it is realistic to believe that site safety managers would be familiar with the protocol of reporting any work-related accidents including, but not limited to, alerting Property Manager Kassandra Bostick which would have placed NYCHA on actual notice.

Further, with regard to petitioner’s excuse, this court credits petitioner’s account that the delay in filing his claim was attributed to his ongoing medical care which included the need to acquire the necessary Worker’s Compensation approval form for an MRI and subsequent diagnosis. *See Medley v Chicon* 305 AD2d 643, 2d Dept 2001 (holding that actual notice and absence of prejudice, even in the absence of a reasonable excuse, will not bar the granting of leave to serve a late notice of claim).

For all of the aforementioned reasons, is hereby:

ORDERED that plaintiff’s order to show cause, (Motion Sequence #001), seeking leave to file a notice of claim against respondents City of New York and the New York City Housing Authority is hereby GRANTED.

This constitutes the Decision and Order of the Court.

<u>10/11/2022</u> DATE					 _____ J. MACHELLE SWEETING, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE