

Matter of Woodruff v New York City Tr. Auth.
2022 NY Slip Op 35148(U)
March 8, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151997/2021
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2-----X HON. THOMAS P. ALIOTTA
In the matter of the application of BEBE WOODRUFF,**DECISION AND ORDER**

Petitioner,

Index No.: 151997/2021

-against

Motion Seq.: 001 & 002

NEW YORK CITY TRANSIT AUTHORITY; and
JOHN DOE, a fictitious name intended to refer to
The driver of the bus, whose true name is unknown
to plaintiff,Respondents.
-----XRecitation, as required by CPLR 2219(a), of the following papers numbered "1" through
"7" were marked fully submitted on the 12th day of January 2022:Papers
Numbered**(Motion Seq. 001)**Notice of Petition, RJ1, Exhibits A
through E (NYSCEF 2-9) 1Respondents' Affirmation in Opposition, with
Supporting Exhibits (NYSCEF 10-16) 2Affirmation in Further Support of Motion
(and in opposition to cross-motion) (NYSCEF 26) 3**(Motion Seq. 002)**Notice of Cross-Petition, Affirmation and
Exhibits (NYSCEF 17-25) 4, 5Petitioner's Affirmation in Opposition to Cross-Motion
(and in further support of motion) (NYSCEF 27) 6

Respondents' Affirmation in Reply (NYSCEF 28) 7

Upon the foregoing papers, petitioner's application for leave to file a late notice of claim is denied (MS_001) and respondents' cross-petition denying the petitioner's application to file a late notice of claim and dismissing the underlying action bearing Index Number 151389/2018 is granted as follows:

Procedural and Factual Background

This special proceeding stems from an incident that allegedly occurred on March 4, 2017 at approximately 6:55 A.M. This incident allegedly occurred on "the SI-53, which was traveling on Clove Road in Staten Island, New York, Richmond County, towards Brooklyn/Manhattan" (NYSCEF 2, par.3).¹ It is alleged by claimant that while "boarding the bus, the bus driver negligently closed the door on her left foot and temporarily trapping her causing her to sustain serious and severe personal injuries to her left foot and knee. Once the claimant was fully on the bus, she was caused to slip and fall and be injured" by respondents" (*Id.*). The notice of claim is personally verified by petitioner.

This incident was first reported to respondents by telephone and acknowledged by respondents in a letter dated March 20, 2017 (NYSCEF 3). This letter advised petitioner that she may file a notice of claim, and upon request, a personal injury claim form would be mailed to her. The notice of claim was served on respondents on Monday, June 5, 2017, as evidenced by the time and date stamp (NYSCEF 2). Petitioner commenced the underlying lawsuit on May 31, 2018 by e-filing a summons and complaint (NYSCEF 4). At some point during the underlying litigation, petitioner commenced this special proceeding.

¹ The facts are recited from the Notice of Claim (NYSCEF 2) as petitioner has failed to e-file in NYSCEF an attorney affirmation and a verified petition in support of the petition. The petition (NYSCEF 1) was returned for correction and a corrected document is not re-filed. Additionally, NYSCEF 9 entitled "Notice of Petition Accompanying Commencement Doc(s)" only contains the two-page Notice of Petition."

ARGUMENTS OF COUNSEL

As stated above, petitioner did not submit a petition or an affirmation in support of this application for leave to file a late notice of claim. In opposition to the petition, respondents posit that this is a “blind accident” that occurred on Clove Road. Further, by a letter dated June 15, 2017, petitioner was advised that the respondents were rejecting the Notice of Claim on two grounds (NYSCEF 11). First, “the exact accident location (cross streets) was omitted”; and 2) the Notice of Claim must have been served within 90 days after the incident, i.e., Friday, June 2, 2017. The letter also advised petitioner that the failure to file a claim in accordance with Public Authorities Law § 1212 and General Municipal Law § 50-e, the claim would be automatically disallowed. In response, petitioner identified the cross street as Norwood Avenue (NYSCEF 12).

It is argued by respondents that a timely Notice of Claim is a condition precedent to suit, and not a statute of limitations (*see* General Municipal Law § 50-e), which must be pled in the summons and complaint (*Fleming v. Long Island R.R.*, 59 NY2d 895 [1983]). However, any application for leave to file a late notice of claim beyond the 90 days, must be made prior to the expiration of the statute of limitations (*Pannell v. NYCH&HC*, 192 AD3d 1130 [2d Dept. 2021]), *Lockwood v. City of Yonkers*, 179 AD3d 688 [2d Dept. 2020]; and General Municipal Law § 50-e[5]). As such, the failure to comply with this condition precedent does not need to be asserted as an affirmative defense and may be raised at any time prior to trial (*Fleming v. Long Island R.R.*, *supra*).

Alternatively, it is argued that the application should be denied because the Notice of Claim is defective in that it fails to identify the precise location of the accident (*Eherts v. County of Orange*, 215 AD2d 524 [2d Dept. 1995]). This failure prejudices respondents’ ability to

properly investigate and defend the claim. Here, respondents have been prejudiced in that they have been unable to identify the driver allegedly involved in this incident. These same arguments are put forth in support of the cross-petition to dismiss the underlying action.

In opposition to the cross-petition (and in further support of the petition), it argued that General Municipal Law § 50-e(5) must be liberally construed and the absence of an acceptable excuse is not necessarily fatal (*see Cicio v. City of New York*, 98 AD2d 38 [2d Dept. 1983]). Here, it is argued that the notice of claim was filed only three days after the expiration of the 90 days. As such, the Courts have held that such a short delay does not constitute prejudice and have granted leave to file a late notice of claim. It is further alleged that, “a municipal corporation may be equitably estopped from asserting the lack of notice of claim when it has wrongfully or negligently engaged in conduct that misled or discouraged a party from serving a timely notice of claim or making a timely application for leave to serve a late notice of claim, and when that conduct was justifiably relied upon by a party” (*Konner v. New York City Transit Authority*, 143 AD3d 774 [2d Dept. 2016]). The doctrine of equitable estoppel is applied to ensure that the “unwary or the ignorant” are not caught in a trap that may be created by statutes such as General Municipal Law § 50-e (*see Bender v. New York City Health & Hospitals Corp.*, 38 NY2d 662 [1976]). Here, as in *Konner*, the respondents held a statutory hearing and proceeded with discovery for two years before this issue was raised. Accordingly, the petition should be granted and the cross-petition denied.

In reply, respondents argue that equitable estoppel should be sparingly invoked and only under exceptional circumstances (*see Nowinski v. City of New York*, 189 AD2d 674 [1st Dept. 1974]), or where there is a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon, that will justify the imposition of the

equitable estoppel doctrine (*see Yassin v. Sarabu*, 284 AD2d 531 [2d Dept. 2001]). It is petitioner's burden to demonstrate the foregoing (*Khela v. City of New York*, 91 AD3d 912 [2d Dept. 2021] and *Ramirez v. New York City School Construction Authority*, 229 AD2d 313 [1st Dept. 1996]). However, petitioner has failed to meet this burden. It is argued that petitioner has not demonstrated that she either 1) failed to timely commence an action against respondents based upon fraud, misrepresentation or deception, and 2) that his reliance on any misconduct was reasonable (*see Ramirez v. New York City School Construction Authority, supra*). It is argued that the statutory hearing was held on October 15, 2018, five months after the commencement of the underlying action and after the expiration of the statute of limitations on June 2, 2018. Respondents reiterate that petitioner has not demonstrated a valid excuse for failing to commence this special proceeding prior to the expiration of the statute of limitations. Finally, it is argued that respondents' participation in pretrial discovery does not constitute estoppel or waive the defense that petitioner failed to comply with the statutory condition precedent to suit (*see Laroc v. City of New York*, 46 AD3d 760 [2d Dept. 2007]).

The Court agrees with respondents.

ANALYSIS

Here, the Court is not empowered to consider either question since petitioner has made this application beyond the statute of limitations (*Laroc v. City of New York*, 46 AD3d 761). Petitioner's argument that by participating in pre-trial discovery and holding the statutory hearing post commencement the respondents are equitably estopped from raising this defense is without merit (*Laroc v. City of New York, supra*). Since petitioner's reliance on *Fleming v. The Long Island Rail Road*, *Konner v. New York City Transit Authority*, and *Cicio v. City of New*

York is misplaced on the law and facts, the petition is denied and the cross-petition to dismiss the underlying action is granted.

The Court in *Fleming* was interpreting New York Public Authorities Law, Chapter 43-a, Article 5, Title 11 (Metropolitan Commuter Transportation Authority), § 1276, not New York Public Authorities Law, Chapter 43-a, Article 5, Title 9 (New York City Transit Authority), § 1212. Under Section 1276, a 90-day notice of claim is not a condition precedent to suit. Rather, § 1276 (1) requires,

As a condition to the consent of the state to such suits against the authority, in every action against the authority for damages, for injuries to real or personal property or for the destruction thereof, or for personal injuries or death, *the complaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the authority or other officer designated for such purpose and that the authority has neglected or refused to make an adjustment or payment thereof (emphasis added).*

According to the plain wording of the statute, a 90-day notice of claim is not required, but rather a 30-day demand for payment. This demand for payment must be affirmatively pled in the summons and complaint. In a one sentence decision, the Court of Appeals affirmed the Appellate Division holding that, “[W]e add only that because the demand provided for in subdivision 1 of section 1276 of the Public Authorities Law is a condition to consent of the state and the passage of 30-days since the demand is required to be alleged in the complaint, the lack of such a demand is not a matter required by CPLR 3018 (subd. b) to be pleaded as an affirmative defense” (*Fleming v. The Long Island Rail Road, supra*). The facts, as outlined by the Appellate Division (88 AD2d 328 [2d Dept. 1982]), were that the although the 30-day demand for payment was complied with, plaintiff failed to include this affirmative allegation in the complaint. In response to a motion for summary judgment to dismiss the complaint for failure to comply with the pleading requirement, plaintiff cross-moved to amend the complaint to

include the allegation and argued that the municipal corporation should be estopped from asserting the defense based on equitable estoppel. This is factually distinct from the facts presented herein. Here, petitioner is not seeking to merely amend the complaint to allege timely compliance with Public Authorities Law §1212 and General Municipal Law § 50-e. The Appellate Division also did not hold that defendants were equitably estopped, but instead, remitted the matter to the trial court for a factual determination. The Court specifically held that a determination could not be made on the “sparse record” presented on appeal (*Fleming v. The Long Island Rail Road*, 88 AD2d 343).

In *Cicio v. City of New York*, the notice of claim was filed one day late. However, plaintiff’s *timely* application to file a late of notice of claim “was granted almost immediately” within the one year and ninety-day statute of limitations (*Cicio v. City of New York*, 98 AD2d 39). Therefore, the Court had the authority to consider plaintiff’s reasonable excuse and determine the question of whether the City acquired actual knowledge of the facts constituting claim.

Finally, the defendant in *Konner v. New York City Transit Authority* moved to dismiss the complaint after the statute of limitations had expired based upon plaintiff’s failure to timely file a notice of claim with the New York City Transit Authority. In this rare instance, the doctrine of equitable estoppel was limited to the facts before the Court. In *Konner*, plaintiff timely filed a Notice of Claim with the Metropolitan Transportation Authority only. In response to the *timely filing* of this Notice of Claim, a letter was sent to plaintiff on behalf of the New York City Transit Authority which noticed a statutory hearing on its behalf. The cover letters sent in *Konnor* contained the MTA logo and included the words “New York City Transit” (*Konner v.*

New York City Transit Authority, 143 AD3d 775). The Appellate Division reversed the lower court's granting of summary judgment holding that, “

Although the MTA and NYCTA share an affiliation, they are separate entities (*compare* Public Authorities Law § 1262 with Public Authorities Law § 1202[1]). Thus, service of a notice of claim upon the MTA does not satisfy the condition precedent of serving a notice of claim upon the NYCTA. However, a municipal corporation may be equitably estopped from asserting lack of notice of claim when it has wrongfully or negligently engaged in conduct that misled or discouraged a party from serving a timely notice of claim or making a timely application for leave to serve a late notice of claim, and when that conduct was justifiably relied upon by that party...

Nevertheless, *under all of the circumstances of this case*, the plaintiff's submissions demonstrated that the NYCTA wrongfully or negligently engaged in conduct that misled the plaintiff to justifiably believe that service of the notice of claim upon the MTA was of no consequence, and lulled her into sleeping on her rights to her detriment (*emphasis added, internal citations omitted*, 143 AD3d 776).

The facts presented in *Konner* differ from those before this Court. The plaintiff in *Konner*, unlike the petitioner herein, never received a rejection letter by the New York City Transit Authority that the Notice of Claim, although timely, was filed with the wrong entity. Here, plaintiff was advised that the Notice of Claim was rejected as untimely. Therefore, under the facts of this case, petitioner was not lulled into a false sense of compliance to her detriment by respondents' participation in pre-trial discovery or conducting the statutory hearing post commencement (*Laroc v. City of New York, supra*).

Based upon the failure to timely move to file a late notice of claim, petitioner's remaining arguments are rendered academic.

Accordingly, it is hereby

ORDERED, that the petition to file a late notice of claim (MS001) is denied in its entirety; and it is further

ORDERED, that respondents' cross-petition seeking an order denying the petition to file a late notice of claim and dismiss the underlying action bearing Index Number 151389/2018 is granted in its entirety; and it is further

ORDERED, that respondents shall e-file a copy of this Order with Notice of Entry in this Index Number and in Index Number 151389/2018; and it is further

ORDERED, that upon e-filing a copy of this Order with Notice of Entry, service shall be deemed complete upon petitioner in this action and in Index Number 151389/2018; and it is further

ORDERED, that upon the e-filing of this Order with Notice of Entry in Index Number 151389/2018, the Clerk shall mark the underlying action disposed and enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: March 8, 2022

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.