

Schneebaum v City of New York

2023 NY Slip Op 30851(U)

March 21, 2023

Supreme Court, New York County

Docket Number: Index No. 153547/2022

Judge: J. Mabelle Sweeting

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. J. MACHELLE SWEETING PART 62

Justice

-----X

TORI SCHNEEBAUM

Petitioner,

- v -

THE CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 153547/2022

MOTION DATE 01/12/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

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

In a prior motion (Motion Sequence #001) the court (Hon. Mary V. Rosado) denied petitioner’s request for leave to serve a late notice of claim (“NOC”). The court found that it did not have jurisdiction over petitioner’s application, because there was no affidavit of service in the record; and no proof that the motion had been served on respondent The City of New York.

Now pending before the court is a second motion (Motion Sequence #002) in which petitioner seeks “an Order, pursuant to New York’s General Municipal Law §50-e(5): 1. Granting Petitioner(s) leave to serve a Notice of Claim on Respondents, The City of New York and New York City Department of Transportation; 2. Tolling the one year and ninety day statute of limitations while the petition herein is being decided; and 3. Declaring the proposed Notice of Claim annexed herein to this Petition to have been served *nunc pro tunc*, as if timely served.”

Respondent New York City Department of Transportation

As a preliminary matter, it is unclear, on this record, whether the New York City Department of Transportation (the “DOT”) is a respondent in this case. The documents filed by petitioner herself, including the Petition (NYSCEF Doc. No. 1); the Request for Judicial Intervention (NYSCEF Doc. No. 2); the Notice of Petition for Leave to Serve Late Notice of Claim (NYSCEF Doc. No. 3); the Statement of Material Facts (NYSCEF Doc. No. 7); and the Verification (NYSCEF Doc. No. 9), do not mention the DOT or name the DOT in the caption. The two orders issued by the court, including the Decision in Motion Sequence #001 (NYSCEF Doc. No. 4) and the Order transferring this case to the undersigned (NYSCEF Doc. No. 17), also fail to mention the DOT or name the DOT in the caption. Importantly, the Notice of Petition (NYSCEF Doc. No. 5), in which petitioner herself lists the relief being sought in the instant motion, does not name the DOT in the caption.

Yet, the Proposed Notice of Claim, (NYSCEF Doc. No. 10), lists the DOT as a respondent, and the Opposition papers filed by the Office of the Corporation Counsel states that he is “the attorney of record for Respondent(s) THE CITY OF NEW YORK, and THE CITY OF NEW YORK S/H/A NEW YORK CITY DEPARTMENT OF TRANSPORTATION.”

Accordingly, because the Corporation Counsel is appearing on behalf of the DOT, this motion is decided on the merits with respect to both The City of New York City (the “City”) and the DOT.

Arguments Made by the Parties

Petitioner argues that the underlying claim arose from an accident that occurred on June 13, 2021, when petitioner was operating a Citibike bicycle at the intersection of 82nd Street and First Avenue in New York, New York. Her Citibike came into contact with a defective condition at or near a metal grate, and caused her and the bicycle to fall to the ground. Petitioner argues that the City and DOT were negligent, careless and reckless, which caused petitioner to sustain severe and permanent personal injuries to multiple portions of her body. Petitioner's attorney also argues, in the Attorney Affirmation (NYSCEF Doc. 6) that petitioner did not retain their law firm until December 21, 2021, over six months after the incident occurred, and that "Immediately thereafter the within application was made."

The opposition, the City argues first, that the Statute of Limitations (the "SOL") in this action has already passed, and that the court should deny the application on this basis. Second, the City argues that the DOT is not an entity that should be served with a NOC, and hence the application should be denied with respect to the DOT on that basis. Third, the City argues that aside from the procedural grounds, the motion should be denied on substantive grounds because petitioner failed to demonstrate that the City acquired actual knowledge of the essential facts constituting the claim within the 90-day period specified in General Municipal Law 50-e(1); failed to offer a reasonable excuse for the late notice; and failed to show how the delay does not substantially prejudice the City's defense.

Conclusions of Law

General Municipal Law § 50–e(5) confers upon the court “the discretion to determine whether to grant or deny leave to serve a late notice of claim within certain parameters.” The statute provides, in pertinent part, that in determining whether to grant an extension of time to serve a notice of claim, a court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90–day period specified in § 50–e(1) “or within a reasonable time thereafter” (§ 50–e[5]). Further, under the statute, the court must take into account all other relevant facts and circumstances, including, among other things, whether the petitioner offered a reasonable excuse for the late notice and whether the delay substantially prejudiced the respondent's defense on the merits. The presence or absence of any one factor, however, is not determinative. Moreover, while the court has discretion in determining motions to file late notices of claim, the statute is remedial in nature, and therefore should be liberally construed [internal citations omitted]” (Thomas v City of New York, 118 AD3d 537 [1st Dept 2014]).

Here, petitioner’s motion is denied in its entirety, on several grounds:

First, with respect to the DOT, the City correctly argues that service of a NOC upon the DOT is improper. *See Silicato v Skanska USA Civ. Northeast Inc.*, 112 AD3d 464 (1st Dept 2013):

In this action seeking to recover for personal injuries suffered by plaintiff Joseph Silicato in the course of a construction project, *plaintiffs' service of a notice of claim on the law department of a City agency failed to satisfy the requirements of General Municipal Law § 50–e(3)(a)*. The statute permits service on the “person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.” The New York City Comptroller and the Corporation Counsel are persons designated to receive service of process, and, as a rule, the Corporation Counsel is the “attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies.”

[citations omitted; italics added]

See also Khela v City of New York, 91 AD3d 912 (2d Dept 2012):

Pursuant to General Municipal Law § 50-e (1) (a) and § 50-i (1) (a), service of a notice of claim within 90 days after accrual of the claim is a condition precedent to commencing an action against the defendants herein. *The New York City Department of Transportation is a department of the City of New York, and is not a separate legal entity. In order for service of a notice of claim upon the City of New York to be proper, it must be made upon either the Corporation Counsel, his or her designee, or the Comptroller of the City of New York.* Here, the plaintiff failed to serve either the Corporation Counsel, his designee, or the City Comptroller within the statutory period.

[citations omitted; italics added]

Second, while it is within the Court's discretion to extend the time to serve a Notice of Claim, such discretion has limits:

The 1976 amendments to section 50-e of the General Municipal Law permit a court to grant an application to file a late notice of claim after the commencement of the action but preclude the court from granting an extension which would exceed "the time limited for the commencement of an action by the claimant against the public corporation" [...] That means that the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled [...] To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so.

See Pierson v City of New York, 56 N.Y.2d 950 (N.Y. Ct. of Appeals 1982).

Here, plaintiff's accident occurred on June 13, 2021, so the statute of limitations of one year and 90 days expired on September 13, 2022.¹ The instant motion was not filed until January 12, 2023, which is four months after the SOL expired. Therefore, even if the DOT was an entity

¹ Plaintiff's accident occurred after the tolling periods provided for pursuant to the Executive Orders issued by then-New York Governor Andrew Cuomo in response to the Covid-19 pandemic. Such orders were first issued in March 2020 and remained in effect until November 2020.

upon which a NOC could properly be served, it is simply not within the discretion of this court to grant plaintiff's application for leave to file a late notice of claim.²

Finally, even if the petitioner were able to overcome the procedural issues described above, the court finds that petitioner has failed to demonstrate that the City acquired actual knowledge of the essential facts constituting the claim within the 90-day period specified in General Municipal Law 50-e(1). Moreover, petitioner failed to offer a reasonable excuse for the late notice, and failed to show how the delay does not substantially prejudice the City's defense. In fact, other than stating that the NOC deadline had already passed by the time petitioner engaged the law firm that now represents her, petitioner, inexplicably, made no arguments whatsoever as to the factors listed above.

The burden is on petitioner to make this showing (*see, e.g., Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009] ["The record further shows that leave to file a late notice of claim was improperly granted. Petitioner failed to meet her burden of demonstrating a reasonable excuse for the delay, the timely receipt by respondents of actual notice of the defect, and the lack of prejudice"]; *Townson v New York City Health and Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018] ["The burden on the issue of substantial prejudice potentially associated with a late notice of claim rests in the first instance with the petitioner"]), and the court finds here that petitioner has failed to meet her burden.

² Although the earlier decision of the court denied petitioner's first motion (Motion #001) without prejudice, such decision did not extend the time by which petitioner could file another motion seeking to serve a late NOC. There is no indication that petitioner sought to reargue or renew that motion (Motion #001), and petitioner did not file an appeal of that decision. Finally, the court notes petitioner did not file the instant motion until three months after the decision on Motion #001 was issued.

Given the above, it is hereby:

ORDERED that this petition is DENIED, with prejudice, in its entirety.

3/21/2023
DATE


J. MACHELLEE SWEETING, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE