

Iorizzo v 3M Co.

2023 NY Slip Op 32318(U)

July 7, 2023

Supreme Court, New York County

Docket Number: Index No. 190203/2021

Judge: Adam Silvera

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. ADAM SILVERA PART 13

Justice

-----X

FRANCIS IORIZZO,

Plaintiff,

- v -

3M COMPANY, A.O. SMITH WATER PRODUCTS, AIR & LIQUID SYSTEMS CORPORATION, CARLISLE INDUSTRIAL BRAKE & FRICTION, CARLISLE MOTION CONTROL INDUSTRIES, INC., CLARAGE FAN, CLEAVER-BROOKS COMPANY, COMPUDYNE CORPORATION, CRANE CO., GENUINE PARTS COMPANY, GOULDS PUMPS, INC., GRINNELL CORPORATION, HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO FB STURTEVANT, THE HOWDEN BUFFALO GROUP AND BUFFALO FAN, I.T.T. INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT, METROPOLITAN LIFE INSURANCE COMPANY, METROPOLITAN TRANSIT AUTHORITY, NORTHRUP GRUMMAN CORPORATION, PNEUMO ABEX CORPORATION, PNEUMO-ABEX LLC, TACO, INC., UNION CARBIDE CORPORATION, WEIL MCLAIN, BRUNSWICK CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO EBONITE INTERNATIONAL, EBONITE INTERNATIONAL, INC., HARWICK STANDARD DISTRIBUTION CORPORATION F/K/A HARWICK CHEMICAL CORPORATION, BRUNSWICK BOWLING PRODUCTS LLC., INDIVIDUALLY AND AS SUCCESSOR TO EBONITE INTERNATIONAL,

Defendant.

-----X

INDEX NO. 190203/2021
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 35

were read on this motion to/for

LEAVE TO FILE

Upon the foregoing documents, it is ordered that plaintiff's motion seeking to deem the notice of claim, filed on November 30, 2021, timely served is granted for the reasons set forth below.

Preliminarily, the Court notes that plaintiff's instant order to show cause sought interim relief to compel the Metropolitan Transit Authority (hereinafter referred to as the "MTA") to appear at plaintiff's deposition. However, shortly after the filing of the instant order to show cause, plaintiff passed away, and, thus, the portion of this order to show cause seeking interim relief was withdrawn.

Here, plaintiff was diagnosed with terminal cancer at the end of March 2021, and immediately began taxing cancer treatment in April 2021. Plaintiff retained counsel in October 2021 and the instant action was commenced several days thereafter. Due to the difficulty in obtaining information from plaintiff due to his illness, physical well-being, cancer treatments, and the COVID-19 pandemic, plaintiff did not articulate the specifics of his employment with the MTA until after the instant action was commenced. Thereafter, a notice of claim was filed shortly after on November 30, 2021. Plaintiff now moves to deem such notice of claim timely served.

The factors in determining whether plaintiff may serve a late notice of claim include: (1) whether plaintiff has demonstrated 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 – a factor that should be accorded great weight, (*see Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dep't 1993]); and (3) whether the delay substantially prejudiced the municipality defendant's ability to defend its case on the merits. *See* GML § 50-e(5); *Gelles v New York City Hous. Auth.*, 87 AD2d 757 (1st Dep't 1982); *Strauss v New York City Tr. Auth.*, 195 AD2d 322 (1st Dep't 1993); *Diallo v City of New York*, 224 AD2d 339 (1st Dep't 1996). No one single factor is determinative. *See Matter of Gerzel v City of New York*, 117 AD2d 549, 551

(1st Dep't 1986). Upon considering the factors herein, and as the notice of claim was already filed with the MTA within the statute of limitations, the Court grants plaintiff's motion.

The purpose of the notice of claim provision in GML § 50-e(5) "is to protect the municipality against unfounded claims and to assure it 'an adequate opportunity...to explore the merits of the claim while information is still readily available.'" *Camacho v City of New York*, 187 AD2d 262, 263 (1st Dep't 1992) (citing *Teresta v City of New York*, 304 NY 440, 443 [1952]). "However, it should not operate as a device to defeat the rights of persons with legitimate claims.... Indeed, '[the statute]...is remedial in nature, and so should be liberally construed.'" *Camacho*, 187 AD2d at 263 (citing *Matter of Santana v City of New York*, 183 AD2d 665, 665 [1st Dep't 1992]). Moreover, GML § 50-e(5) specifically states that "[u]pon application, the court, in its discretion, may extend the time to serve a notice of claim...[, t]he extension shall not exceed the time limited for commencement of an action by the claimant against the public corporation."

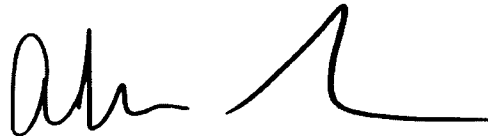
Here, plaintiff's counsel filed a notice of claim on the MTA within a reasonable time after determining that the MTA should be brought into this action such that the MTA had actual knowledge of the claim. There is no indication that the MTA is prejudiced by the delay in the filing on the notice of claim on November 30, 2021. In fact, no prejudice is alleged. Moreover, plaintiff was diagnosed with terminal cancer and began grueling cancer treatments shortly after diagnosis. In an attempt to prolong his life, plaintiff focused on his cancer treatments and did not obtain counsel until several months after the 90 days to file a notice of claim had expired. As the MTA had actual knowledge of the claim, and further have not been prejudiced by any delay, plaintiff's motion is granted. As such, the notice of claim served on the MTA on November 30, 2021 is hereby deemed timely served.

Accordingly, it is

ORDERED that plaintiff's order to show cause is granted and the notice of claim served on the MTA on November 30, 2021 is deemed timely served; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



7/7/2023
DATE

ADAM SILVERA, J.S.C.

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