Albelo v City of New York
2023 NY Slip Op 32324(U)
July 11, 2023
Supreme Court, New York County
Docket Number: Index No. 452415/2022
Judge: Judy H. Kim

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05RCP

Justice

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RAFAEL ALBELO, LISA BATTS, JUAN BENIQUEZ, ROBERT BOLDEN, STERLING CASH, KAREN CUTHBERT, CHANTEL ESTRELLA, MICHAEL GARRETT, PATRICIA GLOVER, MELVIN GREEN, WYNTER HAILEY, SAMUEL JIMENEZ, CHANEL JONES, DAN KELLY, DANIELLE LUCAS, MIGUEL LUGO, DINICK MARTINEZ, STEPHEN MARTINEZ, ROBERT MCNEIL, ENID MENDEZ, CALVIN MICHAEL, CARMEN MICHAELS, ERIKA MORRISON, FELIX NICOT, VERNON PETTIGREW, MILENA PLATA, DIANA RAMOS, COLLEEN RHEM, CARLOS RUIZ, ERIC SANABRIA, EVA SANTIAGO, AUSTIN SIMMONS, LINDA SMITH, NATHANIEL TIMMS, FRANCES TORRES, WILLIAM TULLIS, SHYNA UNITY, THYESSA WILLIAMS, CRAIG WINDLEY,

Plaintiffs,

- v -

THE CITY OF NEW YORK, GARY JENKINS, JOSLYN CARTER, MOLLY PARK, MARTHA CALHOUN, MISCELLANEOUS EMPLOYEES AND AGENTS OF THE CITY OF NEW YORK'S DEPARTMENT OF HOMELESS SERVICES,

Defendants.

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INDEX NO. 452415/2022

MOTION DATE 11/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 12, 13, 14

were read on this motion for LEAVE TO FILE NOTICE OF CLAIM.

Upon the foregoing documents, petitioners' application for leave to serve late notices of claim is granted for the reasons set forth below.

The petition alleges as follows: In response to the COVID-19 crisis, DHS transferred approximately 9,000 homeless individuals from overcrowded DHS shelters to hotels, or "de-densification sites," to slow the spread of the virus among the homeless population (NYSCEF Doc. No. 1 [Petition at ¶¶3-4]). In the process, many transferees were granted provisional reasonable

accommodations for their medical conditions, "acknowledging that they had medical conditions that made it especially dangerous for them to exist in congregate settings" (Id. at ¶5).

However, between mid-June 2021 and early-August 2021, DHS moved approximately 8,700 residents out of approximately 9,000, from de-densification hotels back to DHS shelters (Id. at ¶17). Petitioners herein—thirty-nine "homeless New Yorkers within the New York shelter system," allege that, during this transition, they were: (1) not given reasonable accommodations or had their previously-approved reasonable accommodations disregarded, resulting in disabled individuals being moved to settings that put them in immediate danger and caused them emotional distress; (2) told, incorrectly, that DHS would not provide reasonable accommodations for mental health diagnoses and that submitting a request for a reasonable accommodation would delay or cancel their pending housing search; and (3) "subject to forced confiscation and disposal of their personal belongings (Id. at ¶¶9-10).

Petitioners seek to commence an action against respondents for injuries to person and property sustained during these transfers, asserting claims pursuant to, inter alia, "Title II of the Americans with Disability Act, 42 USC §12132, Article 17, §1 of the New York State Constitution, New York State Human Rights Law §296(2a), New York State Civil Rights Law §40-c(2), and New York City Human Rights Law §8-107(4), as well as common law claims for, inter alia, personal injury, trespass to chattels, conversion, intentional infliction of emotional distress, and negligent infliction of emotional distress.

As a predicate to such an action, petitioners commenced the instant special proceeding on August 23, 2022, seeking leave to file late notices of claim. Petitioners argue that the petition should be granted because the respondents had actual knowledge of the essential facts underlying their claims based on their involvement in the transfers in question, as well as through

contemporaneous emails regarding the violations at issue between petitioners' advocates in the Urban Justice Center-Safety Net Project (See NYSCEF Doc. No. 4). Alternatively, petitioners contend that the notice of claim requirement is inapplicable because their claims directly affect or vindicate the rights of others, bringing them within the public interest exception to GML §50-e.

Respondents oppose the petition, arguing that petitioners failed to demonstrate that respondents acquired actual knowledge and respondents would suffer prejudice due to their inability to adequately investigate petitioners' claims.

DISCUSSION

A tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose" (GML § 50-e[l][a]). However, "[w]hile a notice of claim must generally be filed within 90 days after the claim arises a court, in its discretion, may extend the time for such service after consideration of certain factors. Among the factors that may be considered are whether the municipal defendant acquired actual knowledge of the essential facts constituting the claim within the 90-day period or a reasonable time thereafter, whether the claimant was an infant or was incapacitated … and whether the delay prejudiced the defendant's ability to maintain a defense (Ali by Ali v Bunny Realty Corp., 253 AD2d 356, 357 [1st Dept 1998] [internal citations omitted]). "The presence or absence of any one factor is not determinative. However, courts have noted that the most important factor is whether the municipality acquired actual knowledge of the essential facts constituting the claim within the time specified" (Matter of Corwin v City of New York, 141 AD3d 484, 489 [1st Dept 2016] [internal citations and quotations omitted]). The statute "is remedial in nature and should be liberally construed" (Id.).

Petitioners have not established a reasonable excuse for their delay. Their broad assertions of mental illness and physical incapacity, absent specific factual allegations (See Rivera v City of

New York, 127 AD3d 445 [1st Dept 2015]) or medical affidavits and hospital records (See Matter of Olsen v County of Nassau, 14 AD3d 706, 707 [2d Dept 2005]) are insufficient to do so. Neither does petitioners' asserted inability to promptly retain pro bono counsel constitute a reasonable excuse (See e.g., Lerner v State of New York, 72 AD3d 406, 407 [1st Dept 2010]). However, petitioners' failure to provide a reasonable excuse is not dispositive where, as here, petitioners establish that respondents acquired actual knowledge of the essential facts underlying their claims and will suffer no prejudice from the delay (Ansong v City of NY, 308 AD2d 333, 334 [1st Dept 2003]).

Petitioners have also established that the respondents gained actual knowledge of the facts underlying petitioners' claims through their submission of voluminous email correspondence between petitioners' advocates at the Urban Justice Center-Safety Net Project and respondents' employees, which emails were sent contemporaneously with the alleged violations at issue (See Semyonova v NY City Hous. Auth., 15 AD3d 181, 182 [1st Dept 2005] ["[b]ased on numerous letters it received from petitioner, respondent had actual notice of the essential facts constituting the claims of breach of warranty of habitability"]). Even ignoring the foregoing, as "respondents' policy and its implementation gave rise to petitioners' claims .... actual knowledge may be imputed to respondents each time the policy was implemented" (Yarus v New York City Health and Hosps. Corp., 32 Misc 3d 1207(A) [Sup Ct, NY County 2011] citing Picciano v Nassau County Civ. Serv. Commn., 290 AD2d 164 [2d Dept 2001]; see also Matter of Orozco v City of New York, 200 AD3d 559, 562 [1st Dept 2021] ["Respondent is deemed to have actual notice of the claim by virtue of the fact that its employees participated and were directly involved in the conduct giving rising to petitioner's claims and are in possession of records and documents relating [to same]"]).

In light of respondents' actual knowledge of the facts underlying their claims, petitioners have also established that respondents will not been prejudiced by petitioners' delay in filing the notice of claim (See Id.). Respondents' argument on this point, "that it did not have an opportunity to conduct an investigation because it was not able to preserve potential evidence or interview witnesses while their memories and recollections were fresh" is "insufficient to demonstrate prejudice" (Matter of Dominguez v City Univ. of New York, 166 AD3d 540, 541 [1st Dept 2018]; see also Matter of Mercedes v City of NY, 169 AD3d 606, 607-608 [1st Dept 2019]).

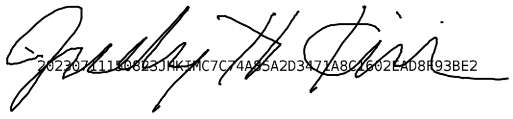
In light of the foregoing, it is

ORDERED and **ADJUDGED** that the petition is granted and petitioners' notices of claim attached to the Petition (NYSCEF Doc. No. 5) are deemed timely filed nunc pro tunc; and it is further

ORDERED that, in the event lawsuits arising from these notices of claim are filed, the petitioners shall commence an action and purchase a new index number; and it is further

ORDERED that petitioners shall, within ten days of the date of this decision and order, file and serve a copy of this decision and order with notice of entry upon all parties.

This constitutes the decision and order of the Court.



7/11/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE