Dubuche v New York City Tr. Auth.
2024 NY Slip Op 30992(U)
March 26, 2024
Supreme Court, New York County
Docket Number: Index No. 151849/2023
Judge: Denise M. Dominguez
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. DENISE DOMINGUEZ	PART	35
	Justice		

--X

RALPH DUBUCHE

Petitioner

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, MTA, THE MTA BUS COMPANY, HAROLD SMITH

Respondents

--X

INDEX NO. 151849/2023

MOTION SEQ. NO. 002

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Respondents, the New York City Transit Authority, MABTOA, MTA, the MTA Bus Company, and bus operator, Harold Smith, timely move pursuant to CPLR 2221 to reargue this Court's Decision and Order granting Petitioner an extension of time to serve a late notice of claim. Upon reconsideration, Respondents' motion is denied.

Background

Petitioner alleges through his second counsel, that on July 13, 2022, he was involved in a motor vehicle accident and sustained serious injuries. According to a photocopy of the police report, Petitioner alleges that the Transit's bus driver caused the accident by rear-ending Petitioner's vehicle and that the impact caused Petitioner to strike another parked vehicle. In contrast, the Transit bus operator alleges that Petitioner caused the accident by illegally cutting in front of the MTA bus.

Before the one year and ninety days from the date after the alleged accident, on February 25, 2023, Petitioner moved pursuant to General Municipal Law §50-e [5] for an extension of time

to serve a late notice of claim upon Respondents. Petitioner then filed another Petition on April 14, 2023, seeking the same relief, withdrawing the previous Petition, and accompanied it with a request for judicial intervention.

In opposition, Respondents made two arguments. Respondents first argued that the Petition should be denied because Petitioner did not provide a reasonable excuse for the delay. Secondly, Respondent argued that the Petition was deprived of any evidence establishing that Respondents had actual knowledge of the facts of the claim within 90 days from the date after the claim arose or within a reasonable short time thereafter as required per General Municipal Law §50-e [5].

As a result of Respondent's opposition, Petitioner without leave of Court but before a decision was rendered, submitted reply papers with evidence that included a photocopy of a police report and email communications between Petitioner's prior counsel and Respondents' counsel.

After reviewing the submitted papers, by Decision and Order dated September 14, 2023, this Court granted the Petition.

Respondents now argue that the Petition should have been denied as there was error in finding that the Petitioner provided a reasonable excuse for the delay. Respondents also argue that it was error to find that Respondents had knowledge of the claim. Specifically, Respondents argue that Petitioner improperly attached the police report in the reply papers and that the police report alone was insufficient to establish knowledge of a wrong. At most, Respondent argue it established notice of an accident not a tort claim.

Motion to Reargue

In considering a motion for leave to reargue pursuant to CPLR 2221, this Court may grant such application upon a showing that it overlooked or misapprehended the facts or the law or for

some reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992]).

Reasonable Excuse Argument

In accordance with General Municipal Law §50-e [5], in deciding to deny or grant an extension of time, one of the key factors to consider is whether a petitioner provides a reasonable excuse for the delay in failing to file a timely prerequisite notice of claim (General Municipal Law §50-e [5]). Yet the absence of a reasonable excuse is not fatal since the presence or absence of any one factor with the exception of the knowledge requirement, is not conclusive (*Dubowy v. City of New York*, 305 AD2d 320 [1st Dept 2003]; General Municipal Law §50-e [5]). Moreover, the statute gives courts great discretion in deciding such applications.

What is paramount is assuring that public entities can timely investigate and thus mount defenses against meritorious tort claims while also assuring that individuals with legitimate claims are able to bring forth such claims (*see Porcaro v City of NY*, 20 AD3d 357 [1st Dept 2005]; *Matter of Orozco v City of NY*, 200 AD3d 559 [1st Dept 2021).

In the Petition, Petitioner provided the following history for the delay: the name of Petitioner's prior counsel who filed a late notice of claim upon the wrong public entity, Petitioner's prior counsel's application for a late notice of claim, the date Petitioner retained current counsel, the date the change of attorney documents was made between Petitioner's current and former counsel, and the date when current counsel filed the notice of the appearance with the Court.

Respondents now argues that Petitioner's delay was unreasonable and further argues that this Court overlooked that Petitioner had legal representation within 90 days from the date of the accident and that Petitioner's current counsel waited several months (89 days) before moving this Court for the relief and did not provide any explanation for his delay.

Upon reconsideration, the better practice would have been for Petitioner's current counsel to move more expeditiously upon being retained and to further explain his delay. Nonetheless this Court's reaches the same conclusion and finds that Petitioner provided enough facts for this Court to deem the delay reasonable. As the application was made timely pursuant to General Municipal Law §50-e [5] and it did "not exceed the time limited for the commencement of an action by the claimant against the public corporation." In addition, Petitioner explains that it was Petitioner's former counsel who errored in timely filing a notice of claim, and that Petitioner's former counsel further errored in serving the proper public entity by serving the Comptroller's Office rather than Transit (see General Municipal Law §50-e [5]). Also, Petitioner's former counsel also moved for an extension of time to file a late notice of claim. Moreover, even if Petitioner had not established a reasonable excuse for the delay, Petitioner's papers nonetheless establish that Respondents had knowledge of a potential tort wrong as of the date of the accident.

Lack of Knowledge Argument

Pursuant to General Municipal Law §50-e, there are many enumerated factors to consider. Yet, courts must consider whether there is evidence to conclude or to reasonable infer that the public entity acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter (General Municipal Law §50-e [5]). The purpose behind this and the intent of the statute is to assure that the public entity can investigate the claim while the evidence is still fresh and available and not be prejudiced in mounting a defense (*see e.g. Porcaro,* 20 AD3d 357; *Matter of Orozco*, 200 AD3d 559).

Respondents here correctly argue that the Petition itself was void of any evidence establishing that Respondents had knowledge. The Petition included only an attorney affirmation. Respondents also argues that Petitioner's counsel improperly attaching emails and an uncertified

police report in the reply papers.

This Court agrees with Respondents to the extent that the evidence submitted by Petitioner's counsel was faint in legal procedure and authentication. This Court further notes, that such submission would have been rejected in other motions practices. However, for purposes of this limited special proceeding, and in balancing the rights of both sides, this Court again finds that Petitioner's evidence was sufficient to show that Respondent had or should have had notice and knowledge of committing a potential tort against Petitioner.

Although the police report was uncertified and contained hearsay, this Court did not consider it for purposes of determining fault or whether any of the Respondents may ultimately be found negligent. This Court's objective was to evaluate whether, with the limited evidence of the police report, did Respondents have sufficient information by which to likely inferred that a potentially actionable wrong had been committed and thus be able to timely investigate and not be prejudiced in preparing a defense (*see e.g. Clarke v. Veolia Transportation Servs., Inc.*, 204 AD3d 666 [2d Dept 2022]; *see Evans v. New York City Hous. Auth.*, 176 AD2d 221 [1st Dept 1991]; *see also Porcaro* 20 AD3d 357; *Matter of Orozco*, 200 AD3d 559).

Based on the police report, Petitioner alleged that Respondents caused a rear-end collision to his vehicle and states that five individuals including Petitioner sustained injuries from the accident. The report also notes that air bags were deployed, and notes damage to the rare of Petitioner's vehicle and to Respondents' bus. Thus, upon reconsideration, this Court reaches the same conclusion, and finds that the police report was sufficient to infer that Respondents had much more than just notice of an accident, rather, Respondents had notice and knowledge of likely committing a potential actionable wrong for personal injury and even property damage against Petitioner.

Further, whether Petitioner can ultimately prove a negligence action against Respondents by establishing that the MTA bus operator's driving was the sole cause of the accident, or Respondents establish Petitioner's actions caused the accident, was immaterial here. As the evidence submitted even if faint and not procedurally sound, was is sufficient for the Court to infer that Petitioner has a legitimate claim and Respondents had knowledge of the essential facts of the claim from the date it occurred providing Respondents with the ability to timely investigate and mount a defense without prejudice (see *Weiss v. City of New York*, 237 AD2d 212 [1st Dept 1997]; *Singh v. City of New York*, 165 AD3d 593[1st Dept 2018]; *Porcaro* 20 AD3d 357; *Matter of Orozco*, 200 AD3d 559).

Accordingly, it is hereby,

ORDERED that the Respondents' motion to reargue pursuant to CPLR 2221 is denied; and it is further

ORDERED that within 20 days from the entry of this Decision and Order, Respondents shall serve a copy with notice of entry upon all parties.

3/26/2024
DATE

DENISE M DOMINGUEZ, J.S.C.

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

151849/2023 DUBUCHE, RALPH vs. THE NEW YORK CITY TRANSIT AUTHORITY ET AL
Motion No. 002