

Cassidy v New York City Tr. Auth.

2024 NY Slip Op 33703(U)

October 17, 2024

Supreme Court, New York County

Docket Number: Index No. 160320/2022

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 35

Justice

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DAVID CASSIDY

Plaintiff

INDEX NO. 160320/2022

MOTION SEQ. NO. 004

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSIT AUTHORITY, DOE NYCTA EMPLOYEE, DOE
NYCTA EMPLOYEE

Defendants

**DECISION AND ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51, 52, 53, 54, 55, 56 were read on this motion to/for REARGUMENT/RECONSIDERATION

For the reasons that follow, Plaintiff's second motion pursuant to CPLR 2221 for this Court to consider additional evidence is denied.

Procedural Background

In this action, Plaintiff through counsel alleges that on December 5, 2021, at about 2:50 a.m., he fell into the subway tracks at the West 50th Street and Broadway station in Manhattan and was subsequently struck by a subway train (NYSCEF Doc. 14).

Plaintiff then moved pursuant to General Municipal Law §50-e for an extension of time to serve a late notice of claim upon Defendants. By Order and Decision, Plaintiff's motion was denied as Plaintiff's papers were bare in evidence showing that Defendants acquired actual knowledge of the essential facts constituting the claim as required by General Municipal Law §50-e [5] (NYSCEF Doc. 30).

Plaintiff then moved pursuant to CPLR 2221 to reargue and renew this Court's decision. By Order and Decision, the branch of Plaintiff's motion seeking re-argument was denied as

Plaintiff did not establish that facts were overlooked or that existing law was misapprehended (NYSCEF Doc. 46). The branch of Plaintiff's motion seeking to renew was denied as time barred. Further Plaintiff did not provide any good cause to show the additional evidence was not known or otherwise unavailable at the time the initial motion was submitted (NYSCEF Doc. 46).

Plaintiff now moves again pursuant to CPLR 2221 to renew. Defendants oppose.

Discussion

It is well known in tort law that an individual wishing to sue a public entity for an alleged tort, must serve upon the public entity a timely notice of claim. Service is not optional, but rather a legal requirement and a condition precedent to commencing an action against a public entity (General Municipal Law §50-e). Accordingly, when for legitimate reasons, an individual is unable to timely serve a public entity, General Municipal Law §50-e [5] allows the individual to explain to a court why an extension to serve the notice of claim should be granted.

In deciding these applications, it is paramount to balance an individual's right to have a legitimate claim heard, against the right of a public entity to fairly prepare a defense by promptly investigating and preserving relevant evidence while it is still fresh and before the passage of time renders such evidence unavailable or lessens its probative value (*Jaime v. City of NY*, 41 NY3d 531[2024]; see General Municipal Law §50-e [5], *Matter of Porcaro v. City of New York*, 20 AD3d 357 [1st Dept 2005]; *Plaza ex rel. Rodriguez v. New York Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466 [1st Dept 2012], *aff'd sub nom.* 21 NY3d 983 [2013]; *Rodriguez v. City of New York*, 38 AD3d 268 [1st Dept 2007]).

Yet, it is also well settled law, that while these requests are generally granted, the burden of explaining the lateness nonetheless rests on the individual who is alleging a tort wrong and is seeking not a constitutional right, but rather monetary compensation for an alleged legal wrong by

a public entity (*see Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466, [2016]; *Jaime*; *see generally Castro v. City of New York*, 141 A.D.3d 456 [1st Dept 2016]).

Further, when a party seeks to move the court to change its prior decision based on new or additional evidence, the moving party shall present that new facts and evidence and shall also provide a reasonable justification as to why the evidence was not presented in the prior motion (*see CPLR 2221[e]*). Notably, a motion to renew is not to be used as a free and second opportunity or a substitute for using due diligence in preparing the prior motion (*see Illinois Nat'l. Ins. Co. v. Zurich Am. Ins. Co.*, 107 AD3d 608 [1st Dept. 2013]; *Naomi S. v. Steven E.*, 147 AD3d 568 [1st Dept 2017]; *Nassau Cnty. v. Metro. Transp. Auth.*, 99 AD3d 617 [1st Dept 2012]).

Here, Plaintiff's counsel, while pro-bono, handled the matter since within the 90-day window after the incident occurred but did not serve a timely notice of claim. Rather Plaintiff served a late notice of claim without leave of court that was deemed a nullity.

Plaintiff then moved for an extension of time to serve a late notice of claim but withdrew the application. On the eve of the expiration of time to request an extension, a year and ninety days after the alleged claim arose, Plaintiff moved again with a bare motion, lacking any showing of a legitimate claim and absent any facts indicating that Defendants within 90 days after the claim arose had actual notice of facts constituting a tort claim against them (NYSCEF Doc. 13, 14, 15). Specifically, the motion did not include any affidavits from Plaintiff or witnesses or any person with personal knowledge of the incident, nor were any police department records, ambulance records, Transit reports, hospital records, a showing that a FOIL request was made, or even social media feeds relating to the incident submitted. Nonetheless, before deciding the motion, Plaintiff was given an additional 30 days to supplement the motion and was directed to submit additional

evidence. Plaintiff did not submit additional evidence. Rather after 30 days, Plaintiff submitted an attorney affirmation, that is not evidence, without any attachments, exhibits or affidavits.

Plaintiff now moves again for this Court to consider additional evidence including paperwork from the New York City Police Department, documenting that on the time and date alleged, Plaintiff was struck by a subway train and that Plaintiff intentionally went down onto the roadbed to lay down and was struck by an incoming train (NYSCEF Doc. 35). While this Court has discretion in considering new evidence, Plaintiff again does not proffer a reasonable and legitimate reason as to why these facts and evidence that were available at the time the prior motion was submitted were not included.

Granting this application now would go against the purpose of a motion to renew by rewarding Plaintiff for his lack of due diligence in preparing the motion and would prejudice Defendants as the underlining incident occurred nearly three years ago on December 5, 2021 (see *Illinois Nat'l. Ins. Co.*, 107 AD3d 608; *Naomi S.*, 147 AD3d 568; *Nassau Cnty.*, 99 AD3d 617; *Jaime*, 41 NY3d 531).

Accordingly, the motion to renew is denied. It is hereby

ORDERED that Plaintiff's motion pursuant to CPLR2221 is denied; and it is further

ORDERED that within 20 days from the entry of this order, Plaintiff shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court.

DENISE M DOMINGUEZ, J.S.C.

10/17/2024
DATE

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