

Mohamed v New York City Hous. Auth.
2024 NY Slip Op 35368(U)
November 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 719446/2018
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

-----X
JOYCE MOHAMED,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.
-----X

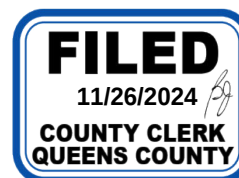
IAS PART 20

Index No.: 719446/2018

Motion Seq. No.: 2

Motion Date: 5.17.2023

Motion Cal. No.: 28



The papers bearing NYSCEF Doc. Nos. 16-27 were read on: (1) the motion filed by the defendant, New York City Housing Authority (the “Defendant”), for an Order dismissing this cause; and (2) the cross-motion filed by the plaintiff, Joyce Mohamed (the “Plaintiff”), for leave to serve a late notice of claim.

The Plaintiff filed this cause seeking to recover damages for personal injuries allegedly sustained on September 26, 2017 when she tripped and fell in an apartment she rented from the Defendant (the “Accident”). The Defendant moves, pursuant to CPLR § 3211 [a][7], to dismiss this cause, contending that the Plaintiff failed to: (1) serve a timely notice of claim on NYCHA; (2) seek leave to serve a late notice of claim; or (3) appear for a statutory hearing. The Plaintiff cross-moves for an order deeming a previously filed notice of claim, dated December 18, 2018, timely filed *nunc pro tunc*. For the following reasons, the Defendant’s motion is granted and the Plaintiff’s motion is denied.

I. Factual Background and Procedural History

The Accident occurred on September 26, 2017 at 4-24 Astoria Boulevard, Astoria, New York (the “Premises”). The Plaintiff, who resided at the Premises, alleges that she tripped and fell in the bedroom of apartment 5C due to “broken flooring.”

The Plaintiff commenced this cause on December 18, 2018, over 14 months after the Accident (*see* NYSCEF Doc. No. 1). The Plaintiff did not timely file a notice of claim and did not move for leave to serve a late notice of claim prior to filing the summons and complaint. On the same day, December 18, 2028, the Plaintiff filed, without leave of Court, a notice of claim upon the Defendant. The notice of claim was filed just eight days before the statute of limitations expired.

The Plaintiff served the summons and complaint on the Defendant on December 24, 2018. The complaint indicates that the “[P]laintiff will move to deem the Notice of claim served *nunc pro tunc*.”

On December 26, 2018, the date the statute of limitations expired, the Plaintiff filed an order to show cause for an Order deeming her “Notice of Claim filed on December 18, 2018 as timely filed *nunc pro tunc* against ... [the Defendant] and extending [her time] time to appear for a public authority hearing and extending time to file a complaint or deem the complaint filed as timely.” The order to show cause, which was assigned to a different justice of this Court, was never signed.

The Defendant filed the present motion in April 2023. In May 2023, the Plaintiff opposed the motion and filed her cross-motion.

II. Discussion

A. The Failure to Timely Move to Serve a Late Notice of Claim

“The time to serve a notice of claim upon a public corporation cannot be extended beyond the time limited for commencement of an action against that party, and the court lacks authority to grant a motion for leave to serve a late notice of claim made more than one year and 90 days after the cause of action accrued, unless the statute of limitations has been tolled” (*Sosnicki v New York City School Construction Authority*, 226 AD3d 721, 723 [2d Dept 2024] [internal quotation marks, brackets and citations omitted]).

The Defendant establishes that the Plaintiff did not serve a notice of claim within 90 days of the accrual of the claim (*see Argudo v New York City Health and Hospitals Corp.*, 81 AD3d 575 [2d Dept 2011] and that the Plaintiff’s cross-motion for leave to serve a late of claim was made over four years after the statute of limitations expired (*see Sosnicki v New York City School Construction Authority*, 226 AD3d 721). The Defendant’s motion is therefore granted and the Plaintiff’s cross-motion is denied.

B. The Failure to Meet the Requirements for Service of a Late Notice of Claim

“CPLR 204 [a] tolls the statute of limitations while a motion to serve a late notice of claim is pending” (*Young Soo Chi v Catelli* 112 AD3d 816, 817 [2d Dept 2013] [citations omitted]). Here, the Plaintiff contends that her present cross-motion for leave to file a late notice of claim is timely because she filed an order to show cause for this relief before the statute of limitations expired. As noted, the order to show cause was never signed by another Justice of this Court. Even if this argument is correct, the Plaintiff’s cross-motion for leave to serve a late notice of claim must be denied, and Defendant’s cross-motion granted, because the factors required for leave to serve a late notice of claim have not been met.

General Municipal Law § 50-e [5] states that “[u]pon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of

state.” The determination of an application for leave to serve a late notice of claim or to deem a late notice of claim timely filed is left to the sound discretion of the trial court (*see Matter of Ruiz v City of New York*, 154 AD3d 945, 946 [2d Dept 2017]). “Although the Supreme Court has broad discretion to evaluate the factors set forth in General Municipal Law § 50-e [5], its determination must be supported by record evidence” (*E.R. v Windham*, 181 AD3d 736, 738 [2d Dept 2020] quoting *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d at 465) [internal quotation marks omitted]).

“In determining whether to grant a petition for leave to serve a late notice of claim or to deem a late notice of claim timely served, *nunc pro tunc*, the court must consider all relevant circumstances, including whether (1) 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, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits” (*Matter of Brown v City of New York*, 202 AD3d 783 [2d Dept 2022]).

“The presence or absence of any factor is not determinative” (*Vincent v City of New York*, 208 AD3d 589, 590 [2d Dept 2022] [internal citations omitted]). “However, whether the public corporation acquired timely, actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter is a factor which should be accorded great weight in determining whether to grant leave to serve a late notice of claim” (*Etienne v City of New York*, 189 AD3d 1400, 1401 [2d Dept 2020] [internal quotation marks and citations omitted]). “In order for a municipality to have actual knowledge of the essential facts constituting a claim, it must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim” (*Parker v City of New York*, 206 AD3d 936, 938 [2d Dept 2022] [internal quotation marks and citations omitted]).

The Plaintiff fails to establish that the Defendant acquired timely, actual knowledge of the essential facts constituting her claim. Although the Plaintiff’s affidavit indicates that the Defendant was aware of the allegedly defective floor before the Accident, such alleged actual notice relates to the alleged defect, not the accident or the claim (*see Ippolito v City of New York*, 230 Ad3d 683 [2d Dept 2024]; *Perez v City of New York*, 175 AD3d 1534 [2d Dept 2019]).

The Plaintiff’s affidavit also indicates that “[w]ithin 30-45 days of my accident, I appeared in housing court and advised Ms. Robinson from the NYCHA, the assistant administrator of my building, which I had, fell because of the broken tiles.” This is, however, also insufficient to establish that the Defendant acquired actual notice of the claim. This statement is not tantamount to actual knowledge of the claim because the Plaintiff did not indicate that she sustained injuries as the result of the Accident (*see Bermudez v City of New York*, 167 AD3d 733 [2d Dept 2018]). Furthermore, Robinson’s purported status as an employee of the Defendant at the time of the Accident is of no assistance to the Plaintiff because the mere reporting of the Accident to Robinson, without more, is insufficient to establish that the Defendant acquired actual notice of the essential facts constituting the claim (*see Vincent v New York City Transit Authority*, 208 AD3d 595, 596-597 [2d Dept 2022]).

The Plaintiff also fails to establish a reasonable excuse for her failure to timely serve a notice of claim. The notice of claim was served, without leave of Court, on December 18, 2018, over 14 months after the Accident. In her affidavit, the Plaintiff avers that: “[m]ost of the time since the accident I have been on pain medication and never leave my apartment unless to go to housing court and/or seek medical treatment, I contacted a few attorneys after the accident but was told they could not help me because it was passed 90 days of the accident and the defendant’s representatives told me in court I had no right to sue because of my landlord tenant issue.” There is no medical evidence in the record to substantiate the Plaintiff’s claim that her medical condition prevented her from making timely service (*see Bermudez v City of New York*, 167 AD3d 733). The inability to retain counsel to take the Plaintiff’s case, even if substantiated, is also not a valid excuse for the delay (*see Parker v City of New York*, 206 AD3d 936 [2d Dept 2022]). The allegation that the Defendant’s “representatives” told the Plaintiff that she could not sue the Defendant relative to the Accident is vague and completely unsubstantiated.

Finally, the Plaintiff “present[s] no evidence or plausible argument that the delay in serving a notice of claim would not substantially prejudice [the Defendant] in defending the action on the merits” (*Jara v Elmhurst Hospital Center*, 213 AD3d 653, 655 [2d Dept 2023] [internal quotation marks and citations omitted]). The burden initially rests on the Plaintiff to establish a lack of substantial prejudice (*see Newcomb v Middle Country Cent. School Dist.*, 29 NY3d 455 [2016]). Here, the Defendant was prevented by the delay from conducting a thorough investigation because the notice of claim was served over 14 months after the Accident (*see Lugo v GNP Brokerage*, 185 AD3d 824 [2d Dept 2020]).

In light of the foregoing determinations, it is unnecessary to consider the parties’ remaining contentions.

III. Conclusion

For the reasons stated above, it is hereby:

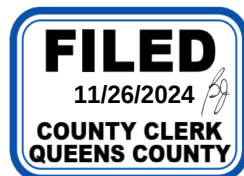
ORDERED that the Defendant’s motion is granted, this cause is dismissed and the Plaintiff’s cross-motion is denied; and it is further,

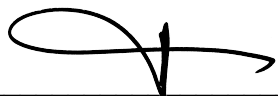
ORDERED, that the Defendant shall serve a copy of this Order with Notice of Entry upon the Plaintiff via NYSCEF by December 31, 2024.

The Clerk of the Court shall: (1) mark this cause dismissed; (2) close all motions; and (3) close all appearances.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
November 25, 2024





MOJGAN C. LANCMAN, J.S.C.