

Agne v New York City Educ. Constr. Fund

2025 NY Slip Op 32354(U)

July 3, 2025

Supreme Court, New York County

Docket Number: Index No. 157525/2024

Judge: Jeanine R. Johnson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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AMADOU AGNE,

Plaintiff,

- v -

NEW YORK CITY EDUCATIONAL CONSTRUCTION
FUND, NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY, THE CITY OF NEW YORK

Defendant.

INDEX NO. 157525/2024

MOTION DATE 11/20/2024,
01/27/2025,

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

-----X

HON. JEANINE R. JOHNSON:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 55, 56, 57

were read on this motion to/for RENEWAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54

were read on this motion to/for MODIFY ORDER/JUDGMENT.

This Court issued a Decision and Order dated 11/08/2024 (NYSCEF Doc. No. 20) granting Plaintiff – Amadou Agne’s application pursuant to GML § 50-(e)(5) to deem the Notice of Claim dated July 10, 2024, timely served *nunc pro tunc* against Defendants – New York City Educational Construction Fund, New York City School Construction Authority and The City of New York (hereinafter, collectively “Defendants”). The New York City School Construction Authority and The City of New York (hereinafter, collectively “The City”) on 11/20/2024, filed the instant motion to renew¹ pursuant to CPLR § 2221(e) opposing Plaintiff – Amadou Agne’s

¹ The instant motion was erroneously filed on behalf of all three defendants. (NYSCEF Doc. No. 22). Consistent with the findings herein, a change of attorney was subsequently recorded. (NYSCEF Doc. No. 38).

application pursuant to GML § 50-(e)(5) to deem the Notice of Claim dated July 10, 2024, timely served *nunc pro tunc* against The City. The New York City Education Construction Fund's (hereinafter, "NYCEF") moved separately by Notice of Motion to vacate this Court's 11/14/2024 decision pursuant to CPLR § 5015(a)(4).

Upon the foregoing documents and oral argument, made upon the record on June 27, 2025, Defendants' motions are denied. This Court vacates its decision dated 3/31/2025 (NYSCEF Doc. No. 55 and affirms its decision dated November 08, 2024 (NYSCEF Doc. No. 20) granting Plaintiff – Amadou Agne's application pursuant to GML § 50-(e)(5) to deem the Notice of Claim dated July 10, 2024, timely served *nunc pro tunc*.

CPLR § 2221(e)(3)

Pursuant to CPLR § 2221(e)(3), a motion to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. "An application to renew must be based upon additional material facts which existed at the time that the prior motion was made but which were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts." *Cuccia v. City of New York*, 306 A.D.2d 2, 2 (1st Dept 2003). "A request for renewal should be rejected when the moving party fails to offer a reasonable excuse for not submitting the new material on the previous motion." *Id* at 3.

This Court initially granted Plaintiff's motion for leave to file a late Notice of Claim upon hearing Plaintiff's sole testimony because Defendants failed to submit opposition or appear for oral argument on 9/25/2024. The City's assertion that it was not properly served with the Order to Show Cause. Def. Aff. p. 2 ¶ 4 (NYSCEF Doc. No. 23) was withdrawn at oral argument,

thereby obviating the need to address that branch of their argument. While the City's further opposition presents new facts, it does not change the determination and outcome of this Court's initial decision. Additionally, it would be a miscarriage of justice to deny the notice of claim given the strength of Plaintiff's arguments pursuant to GML § 50-e (5). Thus, The City's motion to renew pursuant to CPLR § 2221(e)(3) is denied.

CPLR § 5015

CPLR § 5015(a)(1) and (a)(4) states in relevant part that the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: excusable default or lack of jurisdiction to render the judgment or order. Under CPLR § 5015(a)(4), the term "jurisdiction" refers to both personal jurisdiction over the part, as well as the court's subject matter jurisdiction to entertain the litigation. *Everbank v. Kelly*, 203 A.D.3d 138, 142 (2d Dept 2022). A court lacks personal jurisdiction over a defendant who is not properly served with process. *Id.*

"To be entitled to vacatur of a default judgment under CPLR § 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service." *Bank of America v. Lewis*, 190 A.D.3d 910, 911 (2d Dept 2021). When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR § 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR § 5015(a)(1). *115 Essex Street, LLC v. Tenth Ward, LLC*, 227 A.D.3d 640 (2d Dept 2024).

Consistent with The City's position, NYCECF's assertion that it was not properly served with the Order to Show Cause was also withdrawn at oral argument, thereby obviating the need to address that branch of their argument. Thus, NYCECF's motion to vacate pursuant to CPLR § 5015 is denied.

Notwithstanding, in the interest of judicial economy, this Court will issue an opinion on NYCECF's application, which has been fully briefed by the parties.

GML § 50-e(5)

In determining whether leave should be granted pursuant to GML § 50-e(5), the court must consider whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual knowledge of the essential facts of the claim within 90 days after the claim arose or a reasonable time after, and whether the delay would substantially prejudice the municipality in its defense. *Flores-Vasquez v. New York City Health & Hospitals Corp.*, 112 A.D.3d 540 (1st Dept 2013).

Plaintiff argues that Defendants likely acquired actual knowledge because the incident was reported to three people affiliated with Plaintiff's employer, Steve Sweats, Mr. Castro, and an unknown individual. Pl. Aff. p. 5 ¶¶ 16, 17 (NYSCEF Doc. No. 2). Plaintiff further contends that The City was supplied with Plaintiff's accident reports, photographs of the incident location, and medical records to facilitate its investigation. Pl. Aff. p. 3 ¶ 2.

The City argues that Plaintiff failed to provide evidence to support that The City acquired actual knowledge of the essential facts constituting the claim and alleged that The City likely has knowledge of the facts. The City. Aff. p. 10 ¶ 25. The City argues that Plaintiff's onsite manager

is currently deceased, and Plaintiff failed to identify other potential witnesses that are representatives of The City. The City. Aff. p. 10 ¶ 26.

NYCEF argues that Plaintiff does not have a reasonable excuse for the delay and contends that Plaintiff, in his 50-h hearing, stated that he was unaware he was required to file the notice of claim until he retained counsel. NYCEF. Aff. p. 7 ¶ 31, (NYSCEF Doc. No. 40). NYCEF contends that ignorance of the statutory requirement is not a reasonable excuse. NYCEF contends that Plaintiff failed to provide evidence or substantive argument to support that it acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Id. p. 9 ¶ 31. Additionally, NYCEF argues that according to Ms. Wong's affidavit, Mr. Sweats and Mr. Castro did not report the incident to Defendant and there is no record of such incident being reported. Wong Aff. ¶ 11.

This Court finds that Plaintiff met its burden. Although Plaintiff's application does not explicitly assert a reasonable excuse for failing to serve notice within the required time frame, this Court credits Plaintiff's argument that he believed the notice he gave to his shop steward and employer was adequate. Moreover, "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" *Flores-Vasquez*, 112 A.D.3d 540 (1st Dept 2013).

Plaintiff established that The City acquired actual knowledge. Actual knowledge is acquired when the municipality has actual knowledge of the essential facts constituting the claim, not knowledge of a specific legal theory. *See generally Townson v. New York City Health and Hospitals Corp.*, 158 A.D.3d 401 (1st Dept 2018). Plaintiff's accident report states that he injured himself while lifting a stone and hurt his left shoulder and left arm. (NYSCEF Doc. No. 6) and asserts in the Notice of Claim that "he was caused to slip and/or trip on debris, gravel,

dust, and other materials on the roof.” Notice of Claim, p. 2 ¶ 3 (NYSCEF Doc. No. 3). A strong inference can be made that because the Plaintiff filed a workers compensation report and reported the incident to multiple witnesses, The City was provided with actual knowledge of the essential facts of the claim.

Further, Plaintiff provided photographs demonstrating that the injurious condition remained at the worksite location over four months after the accident took place. Plaintiff, in his affirmation, stated “the gravel and debris in the July 19, 2024, photographs are exactly the type that caused me to fall, and I have no reason to believe it is not the same gravel and debris that caused me to slip and/or trip when I was attempting to hoist the stone to where it was supposed to be.” Pl. Aff. p. 2 ¶ 5, (NYSCEF Doc. No. 1). Therefore, Defendants are not substantially prejudiced.

Accordingly, it is hereby

ORDERED that this Court vacates its decision dated 3/31/2025; it is further

ORDERED that The City’s motion to renew pursuant to CPLR § 2221(e)(3) is denied; and it is further

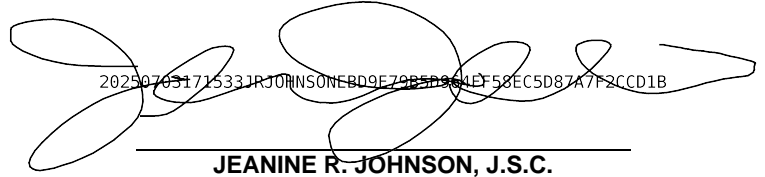
ORDERED that NYCEF’s motion to vacate this Court’s 11/14/2024 decision pursuant to CPLR § 5015 is denied; and it is further

ORDERED that this Court affirms its Decision and Order dated 11/08/2024 granting Plaintiff’s application to deem its late notice of claim timely filed *nunc pro tunc* against Defendants; and it is further

ORDERED that the parties shall file and serve an Answer and responsive pleadings, if any on or before August 27, 2025; and it is further

ORDERED that the parties shall appear for a preliminary conference in Pt 52 DCM, 80 Centre Street, Room 103, New York, NY 10003, on September 17, 2025 at 2:30PM

This constitutes the Decision and Order of the Court.


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JEANINE R. JOHNSON, J.S.C.

7/3/2025
DATE

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