Britt v New York City Health & Hosps. Corp.
2012 NY Slip Op 30770(U)
March 23, 2012
Supreme Court, New York County
Docket Number: 108002/11
Judge: Barbara Jaffe
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SCANNED ON 3/28/2012

[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

JAMES BRITT JR

- v -

NYC HEALTH + HOSPITAL CORP

INDEX NO. 108002/11

MOTION DATE 11/29/11

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAR 28 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/23/12

MAR 23 2012

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

JAMES R. BRITT,

Petitioner,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES,

Respondents.

---x

Index No. 108002/11

Argued: 11/29/11

DECISION AND ORDER

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.S.C.:

For petitioner:
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Subin Associates, LLP
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212-285-3800

For respondent DASNY:
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Newman Myers, et al.
14 Wall Street
New York, NY 10005-2101
212-619-4350

By order to show cause dated September 15, 2011, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) and Public Authorities Law § 1691 for an order striking respondent Dormitory Authority of the State of New York's (DASNY) fourth affirmative defense and deeming its previously served notice of claim timely served, *nunc pro tunc*, or, in the alternative, granting him leave to serve a late notice of claim, *nunc pro tunc*. DASNY opposes.

On August 22, 2010, petitioner slipped and fell on the steps in front of a men's homeless shelter in Manhattan. (Affirmation of Gene L. Chertock [Chertock Aff.]).

At a GML § 50-h hearing held on March 24, 2011, at which DASNY was not present, petitioner testified that his accident occurred at the Bellevue Men's Shelter, located at East 23rd Street and First Avenue in Manhattan, on steps leading from the shelter to the sidewalk adjacent

to East 23rd Street. (*Id.*, Exh. B).

On July 19, 2011, petitioner served DASNY with a summons and verified complaint reflecting that his accident occurred at 462 First Avenue in Manhattan (Affirmation of Jan Kevin Myers in Opposition, dated Oct. 6, 2011 [Myers Opp. Aff.], Exh. A), and on August 5, 2011, DASNY joined issue with service of its answer (*id.*, Exh. B). The fourth affirmative defense asserted therein provides that "[t]he plaintiff's cause of action against DASNY cannot be maintained as a matter of law by reason of the plaintiff's failure to satisfy conditions precedent to an action against DASNY under [GML] § 50-e and Public Authorities Law § 1691." (*Id.*).

By affidavit dated August 31, 2011, a clerk for petitioner's counsel states, in pertinent part, as follows:

> On November 15, 2010, at approximately 3:00 p.m., I attempted to serve [petitioner's] notice of claim on DASNY at their New York City Office . . . . A security guard refused to allow me to go up to their offices. I thereafter left the [n]otice of [c]laim with the [DASNY] [s]ecurity [g]uard. I requested that he sign my copy acknowledging receipt, but he refused. He did not return the [n]otice of [c]laim to me or indicate to me in any other way that he would destroy it or withhold it from the [DASNY] offices upstairs . . . . We were never given any indication that it was not received by [DASNY] or that they considered the manner of service inadequate.

(Chertock Aff., Exh. C). The affidavit does not reflect the address of DASNY's New York City office. (*Id.*).

Plaintiff's notice of claim reflects that his accident occurred at "the Bellevue Hospital Medical Center- New York City Department of Homeless Services (DHS) located at 462 East First Avenue and East 30th Street" in Manhattan and describes the defect on which he tripped as "wet, slick, slippery and poorly lighted steps." (*Id.*, Exh. D).

Sometime before October 6, 2011, petitioner served DASNY with the instant order to

show cause, annexing thereto undated photographs purportedly of the accident site, the transcript of his GML § 50-h hearing, the clerk's August 31 affidavit, a copy of his notice of claim, and a copy of the corresponding affidavit of service. (Chertock Aff., Exhs. A, B, C, D). The affidavit of service provides, in pertinent part, that the clerk gave the notice of claim to a security guard at DASNY and that he "refused service [and] did not stamp or sign [her] copy." (*Id.*, Exh. D). The address at which the clerk attempted service is not provided. (*Id.*).

By affidavit dated October 31, 2011, Amy H. O'Connor, Senior Counsel for DASNY, states that she performed a fruitless search of DASNY's records for petitioner's notice of claim; that DASNY owns Hunter College, Brookdale Campus, which is south of and shares a City tax lot with 462 First Avenue, but not 462 First Avenue; that a men's homeless shelter is located at 400-430 East 30th Street and that DASNY neither owns nor operates it; and that DASNY neither owns nor operates a homeless shelter at East 23rd Street and First Avenue. Annexed thereto are deeds reflecting DASNY's ownership of the Brookdale Campus, which is located at 425 East 25th Street.

II. CONTENTIONS

Petitioner asserts that DASNY obtained actual knowledge of the facts underlying his claim when he timely served it with his notice of claim, as the security guard should have delivered it to DASNY's office, and that respondent has not been prejudiced as a result. (Chertock Aff.). He also claims that, if granted leave to serve a late notice of claim, DASNY will suffer no prejudice, as photographs of the accident site show that it remains unchanged, and DASNY is "nothing more than an absentee landlord and financier with respect to [the] building." (*Id.*).

In opposition, DASNY denies that petitioner served it with his notice of claim, as the affidavit of service reflects that the guard "refused service" and does not provide the address at which the clerk attempted service, and the August 31 affidavit sets forth no legal justification for the clerk's belief that the security guard could accept service on its behalf. (Myers Opp. Aff.). It also denies having obtained actual knowledge of the facts underlying petitioner's claim until receipt of his complaint nearly a year after the accident and claims that petitioner's inconsistent identification of the accident location has prejudiced its ability to investigate his claim. (*Id.*). In any event, relying on O'Connor's affidavit, DASNY maintains that petitioner's claim against it is patently meritless, as it does not own 462 First Avenue and neither owns nor operates the homeless shelters located at 400-430 First Avenue and East 23rd Street and First Avenue, and petitioner offers no evidence demonstrating that it is an out-of possession landlord or financier of any of these buildings. (*Id.*). And, DASNY observes that petitioner offers no excuse for his delayed filing. (*Id.*).

III. ANALYSIS

Pursuant to Public Authorities Law § 1691, an action "founded on tort shall not be commenced . . . unless a notice of claim shall be served on an officer or employee of the authority for such purpose . . . in compliance with the requirements of [GML § 50-e]." Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose.

The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the public entity acquired actual knowledge of

the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the public entity in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

However, where a claim "patently lacks merit," leave to file a late notice of claim should not be granted. (*W. Seneca Cent. School Dist. v Hess*, 15 NY3d 813, 814 [2010]). Here, as respondent offers evidence reflecting that it neither owns nor operates any of the alleged accident locations, and as petitioner merely speculates as to its status as a landlord or financier of same, his claim is patently meritless. In light of this determination, the parties' remaining contentions need not be considered.

In any event, it should be noted that petitioner has failed to demonstrate that he properly served respondent with his notice of claim, as neither of the clerk's affidavits reflects the address at which she left the notice of claim (CPLR 306), and service on a security guard does not satisfy the requirements for personal service on a state agency absent evidence that the guard was designated to receive service (CPLR 307[2]). As petitioner does not allege that respondent obtained actual knowledge in another manner, and as the photographs are undated and unauthenticated such that whether the accident location remains unchanged may not be determined, he has also failed to demonstrate an absence of prejudice. (*See Matter of Santiago v*

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New York City Tr. Auth., 85 AD3d 628 [1st Dept 2011] [where petitioner failed to establish actual knowledge, his unsupported assertion that the accident-causing condition remained unchanged seven months after accident insufficient to demonstrate absence of prejudice]). Given his failure to assert an excuse for his delay, he would not be entitled to leave to serve a late notice of claim even if his claim was not patently meritless.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for an order striking defendant Dormitory Authority of the State of New York's fourth affirmative defense and deeming its previously served notice of claim timely served, *nunc pro tunc*, or, in the alternative, granting him leave to serve a late notice of claim, *nunc pro tunc*, is denied.

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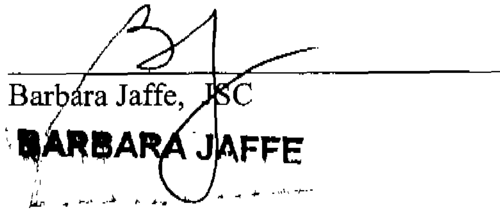

Barbara Jaffe, JSC

BARBARA JAFFE

DATED: March 23, 2012
New York, New York

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE