

Cando v Hudson River Park Trust

2012 NY Slip Op 31502(U)

June 5, 2012

Sup Ct, NY County

Docket Number: 101503/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 101503/2012
CANDO, JUAN
vs.
HUDSON RIVER PARK TRUST
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOT. OF CLAIM

INDEX NO. _____
MOTION DATE 4/3/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 15, were read on this motion to for serve late notice of claim.
Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s) 1-9
Answering Affidavits — Exhibits _____ | No(s) 10-15
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &
ORDER.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/5/12 _____ J.S.C.
JOAN B. LOBIS

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

UNFILED JUDGMENT

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
JUAN CANDO,

Petitioner,

Index No. 101503/12

-against-

Decision, Order, and Judgment

HUDSON RIVER PARK TRUST,

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Juan Cando brings this special proceeding for an order, pursuant to Gen. Mun. L. § 50-e(5), granting him leave to serve a late notice of claim upon respondent Hudson River Park Trust ("HRPT") in connection with injuries sustained by petitioner.

Petitioner alleges that he suffered injuries when a utility vehicle, owned by respondent and operated by Curtis Mitchell, a Doe Fund employee, struck him at Pier 40 at the Hudson River Park, at approximately 3:30 p.m., on August 10, 2011. Petitioner was then transported by ambulance to Beth Israel Medical Center. Petitioner's counsel states that at the time that Mr. Cando retained him, Mr. Cando could not tell him who owned the vehicle that caused his injury or the agency that recorded the incident. Petitioner's counsel also states that Mr. Cando does not speak English, which further hindered communication. On or about August 11, 2011, petitioner's counsel retained Irwin Blye Investigations (the "Investigator") to acquire police reports regarding Mr. Cando's accident. After conducting a search of all police precincts in New York City, the Investigator was unable to locate a police report related to Mr. Cando's accident.

On September 9, 2011, petitioner filed a no-fault application with the City of New York upon the belief that petitioner had been struck by a police cart. Thereafter, upon receipt of Mr. Cando's ambulance call report and medical records from Beth Israel Medical Center, petitioner's counsel noticed that the Parks Department Police Agency's presence was noted. On or about October 17, 2011, petitioner filed a notice of claim with the City of New York, attaching a copy of the ambulance call report, and the City of New York acknowledged receipt of the claim.

Meanwhile, upon receipt of Mr. Cando's medical records, the Investigator continued searching for information about Mr. Cando's accident and obtained documents, correspondence, and photographs from HRPT referencing petitioner's accident. The materials revealed that petitioner had been struck by a utility vehicle identified as "Toro 61," registered to HRPT and operated by Curtis Mitchell. On or about January 4, 2012, the Investigator forwarded this information to petitioner's counsel. On or about January 17, 2012, petitioner filed a notice of claim with HRPT, which was untimely by two months and one week. Petitioner now brings this proceeding seeking an extension of time to serve a notice of claim.

Petitioner argues that the court should exercise its discretion in extending his time to file a notice of claim upon HRPT because: (1) there was a reasonable excuse for the delay; (2) HRPT acquired actual knowledge of the essential facts of the claim on the day of petitioner's accident, as evidenced by the numerous reports generated on the day of, and on the day following, the accident; and (3) HRPT has not suffered any substantial prejudice in maintaining its defense on the merits as a result of the delay, as it has already undertaken the necessary investigation and obtained

photographs and video surveillance of the incident.

In opposition, respondent argues that the court should deny petitioner's request for an extension of time to serve a notice of claim. First, respondent avers that the notice of petition fails to contain an affidavit of support or proposed notice of claim sworn to by Mr. Cando, or alternative proof, to allow the court to evaluate whether the claim is meritorious, and that petitioner's attorney's affirmation and his recitation of facts are not a substitute for Mr. Cando's personal knowledge. Second, respondent states that petitioner's delay in serving the notice of claim is unreasonable because the Investigator was aware that HRPT is a public entity within the 90-day time period, and the Investigator's knowledge should be imputed to petitioner's counsel because an attorney has a non-delegable duty to investigate and identify potential defendants in a tort case. Third, respondent argues that it had no knowledge that petitioner wanted to file a claim against it.

General Municipal Law § 50-e(1)(a) sets forth that the "notice of claim shall . . . be served in accordance with the provisions of [section 50-e] within ninety days after the claim arises[.]" Upon application to the court, the time to serve a notice of claim may be extended up to the time limited for the commencement of an action, or, in this case, one year and ninety days. See Gen. Mun. L. §§ 50-e(5) and 50-i(1). Under section 50-e, key factors to consider in determining whether to deem a notice of claim timely are:

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 notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor

is not determinative. The failure to set forth a reasonable excuse is not, by itself, fatal to the application.

Velazquez v. City of New York Health & Hosps. Corp., 69 A.D.3d 441, 442 (1st Dep't 2010) (internal citations and quotation marks omitted) (citations omitted). Additionally, in determining whether to grant the extension, the court shall consider "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted." Gen. Mun. L. § 50-e(5). See also Gherardi v. City of N.Y., 294 A.D.2d 101 (1st Dep't 2002).

Upon consideration, the court finds that petitioner has made a sufficient showing to grant him leave to serve a late service of notice of claim upon HRPT. The court finds unpersuasive respondent's argument that the notice of petition lacked the necessary evidentiary support. Respondent argues that an affidavit of fact is required for an application for a late notice of claim. However, the cases that respondent cites to support its proposition are distinguishable. In re Roberts v. County of Rensselaer, 16 A.D.3d 829 (3d Dep't 2005); In re McLaughlin v. North Colonie Cent. Sch. Dist., 269 A.D.2d 658 (3d Dep't 2000); Bailey v. City of N.Y., 159 A.D.2d 280 (1st Dep't 1990); In re Vezza v. City of Yonkers, 92 A.D.2d 570 (2d Dep't 1983). Here, there exist various reports and communications between HRPT employees referencing the accident on August 10, 2011, and providing specific, factual details. On August 10, 2011, Curtis Mitchell completed an incident report, stating that on that day, at 3:30 p.m., at Courtyard Tunnel Pier 40, "while driving Toro 61 Drove pass bike rack, when a park patron walk into Toro on left hand side. Individual was bending down at bike rack. I had no visual." He also stated that he immediately notified Kemraj Mangroo

of the incident and that PEP¹ was on location. This information was also recorded in an e-mail, addressed to himself, at 4:51 p.m. on the same day. Mr. Mangroo, an HRPT employee, also submitted an Incident Report, referencing an accident that occurred on August 10, 2011, at 3:35 p.m., at Pier 40-Courtyard Tunnel, stating that Curtis Mitchell contacted him to advise that he had been involved in an accident at Pier 40. Mr. Mangroo also stated that he observed a male park patron on the floor, sitting on the side of the utility vehicle, with an injury to his right leg, “that PEP (Sgt. Phillips) was already on scene. EMS was notified by unknown person.” Mr. Mangroo further stated that he spoke with Curtis Mitchell, who said that “he was driving by when the patron spun around and walked into the toro.” A Police Accident Report, completed at 4:00 p.m. on the day of the accident, also recites the same facts about the accident. Joanne Cordero of PEP completed a “City of New York Park’s Recreation Complaint Report” on the day of the accident, which recites the information given to her by Mr. Mitchell. Additionally, HRPT obtained three (3) photographs of Mr. Cando’s injured right leg. Taken together, these statements and photographs provide sufficient factual detail to support the petition.

The court also finds unpersuasive respondent’s argument that it was unaware that petitioner sought to bring a claim against HRPT within the statutory time period. Respondent argues that although it had prompt notice of the accident, it had no knowledge of the theory of liability against it. In *re Khalid v. City of N.Y.*, 91 A.D.3d 779 (2d Dep’t 2012), the case to which respondent cites in support of its proposition, is distinguishable. Here, respondent kept records

¹ Although neither party defines the term, the court construes “PEP” to delineate “Park Enforcement Patrol.”

pertaining to the essential facts of petitioner's accident. Most notably, on the day of the accident, HRPT's Operations Desk, in an e-mail addressed to various HRPT employees and titled "Bicyclist struck by Doe Fund Supv.," described an accident that occurred at 3:46 p.m., at Pier 40, involving Curtis Mitchell. On August 11, 2011, the day after the accident, Arleen DeJesus from HRPT's Department of Operations submitted a Request Form for video camera footage taken on August 10, 2011 from 3:30 to 4:00 p.m. of the area "facing the courtyard field tunnel @ pier 40 for accident involving park patron and doe fund personnel." Also, on August 11, 2011, in an email addressed to Mr. Mangroo and copied to Mr. Mitchell, Debra Kustka, an HRPT employee, suspended driving privileges for Curtis Mitchell "until further notice." Given this correspondence, in addition to the details of the accident provided by Mr. Mitchell and Mr. Mangroo, the court concludes that HRPT did receive actual knowledge of the facts underlying the claim as early as August 10, 2011.

The court further finds unpersuasive respondent's argument that petitioner's failure to present an adequate excuse for his late notice of claim should bar his application for leave to file such. It appears that by mid-October 2011, petitioner's attorney became aware that the New York City Parks Department was at the scene of petitioner's accident, and filed a Notice of Claim with New York City. By early November 2011, the Investigator received documents indicating that HRPT was the tortfeasor. Petitioner's attorney avers that the Investigator did not provide him with the results of its investigation until January 11, 2012. The two-month delay between the Investigator receiving the documents and forwarding the documents to petitioner's attorney essentially amounts to law office failure, which generally does not amount to a reasonable excuse for the delay. However, petitioner's delay in filing a notice of claim against HRPT was partly due to petitioner's

attorney's belief that the City of New York was the proper defendant. Gen. Mun. L. § 50-e(5) provides that "[in] determining whether to grant the extension, the court shall consider, . . . whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the should be assert[.]" Also, petitioner's counsel details the efforts taken to identify the proper entity and the difficulties endured along the way, i.e., Mr. Cando's language barrier and the non-existent police reports. Based on these facts, petitioners have demonstrated a reasonable excuse for the delay in serving a notice of claim. Moreover, a failure to satisfy the "reasonable excuse" factor does not bar the granting of leave to serve a late notice of claim provided that the tortfeasor had actual notice of the facts of the claim and that there is no prejudice. Nardi v. County of Nassau, 18 A.D.3d 520, 521 (2d Dep't 2005). Respondent has not raised any claims of prejudice by the delay. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted; and it is further

ORDERED that petitioner shall serve and file a notice of claim against Hudson River Park Trust within thirty (30) days of service of a copy of this decision with notice of entry.

Dated: June 5, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room -7.141B).