

Matter of Conway v Hudson

2012 NY Slip Op 31649(U)

June 25, 2012

Supreme Court, New York County

Docket Number: 101609/12

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JR.
Justice

PART 33

In re:
Megan Conway
Hudson River Park Trust

INDEX NO. 101609/12
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to 16 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-9
10-12
13-16

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See memorandum decision and judgment annexed hereto.

FILED

JUN 21 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/12/12

ALEXANDER W. HUNTER JR. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
Megan Conway,

Index No.: 101609/12

Petitioner,

Decision and Judgment

For an Order Pursuant to G.M.L. § 50-e(5) to
Serve a Late Notice of Claim

-against-

FILED

Hudson River Park Trust,

JUN 21 2012

Respondent.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for permission to serve a late notice of claim against respondent is denied and the petition is dismissed with prejudice, without costs and disbursements to either party.

On September 27, 2011, petitioner Megan Conway ("petitioner" or "Conway") was jogging on a bicycle path along the Westside Highway at Canal Street in Manhattan when she tripped on a metal chain that linked two traffic barriers approximately fifteen feet apart from one another. Petitioner asserts that this area was the sole means of egress from the bicycle path.

On November 7, 2011, a letter of representation was sent by petitioner's counsel to respondent Hudson River Park Trust¹ ("respondent" or "HRPT") notifying them that the firm had been retained to "prosecute claims arising from injuries sustained in an accident...on the West side Highway at Canal Street & West Street, New York, NY." The letter also indicated the date and time of the incident. On November 9, 2011, a timely notice of claim was served upon the City of New York. On December 22, 2011, Conway appeared for a G.M.L. § 50-h hearing conducted by the City of New York.

Petitioner alleges that HRPT along with the City of New York failed to maintain and inspect the park and is therefore liable for the injuries she sustained during a trip and fall accident. Conway asserts that respondent will not be substantially prejudiced if she is permitted to serve a late notice of claim. Petitioner argues that respondent received timely notice of the claim by letter dated November 7, 2011 and the condition that caused petitioner to fall, the chain,

¹ Respondent is a public benefit corporation created under the Hudson River Park Act § 5(1) for the purpose of designing, building, operating, and maintaining the Hudson River Park.

exists today and is ready for inspection. It was not until January 25, 2012, when petitioner's counsel felt that it had a strong claim against HRPT as the managing agent for the parcel of land where the accident occurred. On that date, petitioner's counsel was contacted by a second client who suffered injuries due to the same allegedly dangerous condition in the instant underlying claim.

In support of her application, petitioner submits a copy of the proposed notice of claim, the letter dated November 7, 2011 addressed to respondent, a copy of the timely notice of claim served upon the City of New York and a photograph of chain positioned between the two barriers.

Respondent asserts that the incident occurred on September 27, 2011 and a notice of claim was due by December 26, 2011. HRPT argues that it did not learn the essential facts about this claim until March 5, 2012, the date when respondent was served with the instant order to show cause. Petitioner's November 7, 2011 letter makes no mention of a chain or Hudson River Park. Instead, respondent asserts that this letter suggests a roadway accident outside Hudson River Park. Therefore, HRPT had no reason to investigate the alleged incident. Respondent also argues that petitioner has no reasonable excuse for her failure to serve a timely notice of claim. Both HRPT's website and the Hudson River Park Act § 11 explicitly indicate its notice of claim requirement.

Respondent asserts that the chain is used by the Port Authority of New York and New Jersey ("Port Authority") personnel in connection with its operations at a Holland Tunnel ventilation tower located at Pier 34. Port Authority employees periodically move and reposition the chain to permit passage of their vehicles through the two barriers. Had respondent been timely served with a notice of claim, HRPT asserts that it would have interviewed Port Authority personnel as to the chain's positioning within the ninety day period. Petitioner also fails to indicate in what dangerous manner the chain was positioned on the date of the incident and she does not indicate when the photograph of the chain was taken. There were also no incident reports filed indicating any sort of accident that occurred on that day.

Respondent also argues that the instant application is defective because it is not supported by evidentiary proof in admissible form. HRPT maintains that an affidavit of fact is required as support for an application for a late notice of claim and petitioner has failed to submit one.

In reply, petitioner argues that the November 7, 2011 letter in conjunction with the instant order to show cause provides respondent with actual notice of the underlying facts within a reasonable time after the expiration of the ninety day period. Petitioner also notes that respondent received a prior notice of claim from another individual who suffered injuries due to the defective condition. Petitioner asserts that the photograph she took of the chain immediately after her accident provides the same information that HRPT would have gathered had it conducted an investigation shortly after the incident. In sum, petitioner argues that respondent would suffer no prejudice if the instant petition was granted.

In further support of her application, petitioner submits an affidavit attesting to the facts surrounding the incident as well as the reasons explaining why she failed to timely serve a notice of claim on respondent.

Filing a notice of claim pursuant to G.M.L. § 50-e is a condition precedent for tort claims against municipalities. **G.M.L. § 50-e(1)(a)**. In an application to serve a notice of claim beyond the 90 day statutory period, the court will consider the following three factors: 1) whether petitioner has a reasonable excuse for the delay; 2) the municipality had “actual knowledge of the essential facts constituting the claim” within 90 days after the claim accrued or a reasonable time thereafter; and 3) the delay in serving the late notice of claim will not prejudice the municipality. **G.M.L. § 50-e(5)**. The purpose of the notice of claim is “to protect the public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently.” **Heiman v. City of New York, 85 A.D.2d 25, 27 (1st Dept. 1982)**. However, the absence of one of the factors is not dispositive and the absence of a reasonable excuse is not fatal. **Matter of Dubowy v. City of New York, 305 A.D.2d 320 (1st Dept. 2003)**.

It is well settled that a party must submit an affidavit from an individual with personal knowledge of the facts in support of an application to serve a late notice of claim. **See, Bailey v. City of New York, 159 A.D.2d 280 (1st Dept. 1990); Rodriguez v. City of New York, 86 A.D.2d 533 (1st Dept. 1982)**. In an attempt to cure this defect, petitioner submitted an affidavit in her reply papers outlining the details of the accident as well as providing an excuse for her delay in serving a timely notice of claim. However, the function of reply papers is to address arguments made in opposition to movant’s papers not to permit movant to introduce new arguments or new evidence in support of the motion. **Kennelly v. Mobius Realty Holdings, 33 A.D.3d 380 (1st Dept. 2006); Ritt v. Lenox Hill Hosp., 182 A.D.2d 560 (1st Dept. 1992)**. Therefore, petitioner’s affidavit submitted in reply papers will be disregarded by this court.

Petitioner has failed to establish that respondent acquired actual knowledge of the essential facts constituting the claim within ninety days after the claim accrued or a reasonable time thereafter. Actual knowledge of essential facts of the claim means the facts which would show a connection between the accident and the municipal corporation’s negligence. **Wright v. City of New York, 66 A.D.3d 1037 (2nd Dept. 2009)**. Contrary to petitioner’s arguments, the November 7, 2011 letter did not provide respondent with actual knowledge of the essential facts constituting her claim. The letter makes no mention of a chain, a trip and fall accident, or even Hudson River Park. Instead, a plain reading of the letter suggests that a roadway accident had occurred on the West side Highway, a roadway which is not maintained by HRPT. Respondent did not acquire actual knowledge of the underlying claim that it was negligent in maintaining the portion of Hudson River Park where petitioner was injured. The letter in no way alerted respondent as to the need to investigate a metal chain that was positioned between two jersey barriers along the bicycle path at Canal and West Street. Respondent would also be prejudiced because it has lost the opportunity to timely investigate the claim by inspecting the positioning of the chain shortly after the incident and interviewing any Port Authority employees who may have repositioned the chain that day and any other witnesses to the incident. Moreover, petitioner has

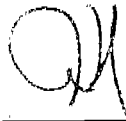
failed to establish that she has a reasonable excuse for the delay.

Accordingly, it is hereby,

ADJUDGED that the petition is denied and the proceeding is dismissed with prejudice, without costs and disbursements to either party.

Dated: June 12, 2012

ENTER:



FILED

J.S.C.

JUN 21 2012

ALEXANDER W. HUNTER JR

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