[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

NANCY LOUGHLIN,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY and MARVIN WILSON,

Defendants.

INDEX NO. 400461/13

MOTION DATE 10/25/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 5 were read on this motion for dismissal / summary judgment

Notice of Motion—Affirmation in Support—Exhibits A-B—Affidavit of Service | No(s). 1-3

Affirmation in Opposition—Affidavit of Service—Exhibits A-H | No(s). 4-5

Upon the foregoing papers, it is ordered that defendant's motion for dismissal / summary judgment is decided in accordance with the annexed memorandum decision and order.

Dated: 12/23/13
New York, New York

, J.S.C.

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

1. Check one:..... X CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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NANCY LOUGHLIN,

Plaintiff,

Index No. 400461/2013

- against -

NEW YORK CITY TRANSIT AUTHORITY and MARVIN WILSON,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

At issue is whether a public authority is entitled to dismissal of an action against it due to the plaintiff's failure to serve a notice of claim form upon it required by law, when plaintiff alleges that correspondence and attachments constituted the notice of claim.

BACKGROUND

Defendants New York City Transit Authority (NYCTA) and its employee move to pursuant to CPLR 3211 ad CPLR 3212 for an order of dismissal, inter alia, because of plaintiff's failure to serve a notice of claim. (*See* Pub. Auth. Law §1212; General Municipal Law §50-e.) Plaintiff claims injury from an accident on December 10, 2011. No notice of claim form was ever served. However, plaintiff relies on correspondence (and attached documentation) dated February 14, 2012 and February 23, 2012 from plaintiff's former counsel to the NYCTA Claim

Processing Unit in order to "process [plaintiff's] claim for personal injuries as well as PIP benefits." (Kanuck Affirm. Ex. E [Feb. 14, 2012 Letter].) The February 14, 2012 letter states,

> "Please be advised that this office has been retained to represent the above named in a claim for injuries sustained as a result of a bus accident which occurred on December 10, 2011. Enclosed please find MTA Information Exchange Form which sets forth the bus information.
>
> Enclosed also find initial narrative report for date of service January 16, 2012 from her treating physician, Dr. Nancy S. Speez of the Sall/Myers Medical Associates.
>
> Please provide me with a copy of the Incident report for this accident and any other forms that need to be completed to process her claim for personal injuries as well as a claim for PIP benefits."

(*Id.*) The letter included the referenced attachments - the MTA Information Exchange Form and the narrative report from plaintiff's treating physician. (*Id.*)

The February 23, 2012 letter states,

> "Enclosed please find completed and duly executed Application for Motor Vehicle No-Fault Benefits, Vehicle in the Household Rider and Claimant Verification of Facts. The claimant is presently treating at Sall/Myers Medical Associates, 4428 Bergenline Avenue, Union City, New Jersey. Enclosed also find initial narrative report for date of service January 16, 2012 from her treating physician, Dr. Nancy S. Speez of the Sall/Myers Medical Associates.
>
> If you are in possession of the Incident report for this accident, please provide me with a copy. Also please advise if you will also be handling the claim for personal injuries."

(Kanuck Affirm. Ex. F [Feb. 23, 2012 Letter].) The letter included the referenced attachments - Application for Motor Vehicle No-Fault Benefits, Vehicle in the Household Rider and Claimant Verification of Facts. (*Id.*) Plaintiff alleges that the initial narrative from the treating physician was also attached to this letter. (*Id.*)

DISCUSSION

Plaintiff here argues that the correspondence and attachments should be deemed a valid and timely notice of claim. Plaintiff is incorrect. The correspondence does not place the Authority on notice of the plaintiff's intent to commence a tort action. It does not use the word "negligence" and it does not conform to the statutory requirements for the form and content of a notice of claim.

In *Richardson v New York City Transit Authority* (210 AD2d 38, 39 [1st Dept 1994]), the Appellate Division, First Department ruled, "the no fault application alone did not satisfy the notice requirements of the Public Authorities Law § 1212." The Appellate Division, Second Department, has also consistently held that a no-fault claim form served on the NYCTA is insufficient to satisfy the notice of claim requirements. (*See Astree v New York City Tr. Auth.*, 31 AD3d 589 [2d Dept 2006] [collecting cases].) The Appellate Division, Second Department

reasoned,

> "Although a notice of claim need not be denominated as such in order to meet the requirements of those provisions, it must advise the public authority of the claimant's intent to commence a tort action against it. In this way, the purpose behind the service requirement, i.e., to afford the public authority or municipality 'an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available', may be achieved. In contrast, when one serves a no-fault claim form his or her purpose is to obtain expeditious compensation for injuries sustained through the prompt payment of benefits without regard to fault and without expense to the claimant. Thus, the regulations pertaining to no-fault coverage are written in such a way as to discourage investigation by the insurer. To hold that the serving of a no-fault claim form is sufficient to meet the notice requirements of General Municipal Law § 50–e and Public Authorities Law § 1212(2) would clearly defeat the purpose of those provisions, as well as the purpose behind the no-fault law."

(*Zydyk v New York City Transit Auth.*, 151 AD2d 745, 746 [2d Dept 1989][internal citations and quotation marks omitted].)

Yet, in certain cases originating with *Losada v Liberty Lines Transit* (155 AD2d 337 [1st Dept 1994]), the Appellate Division, First Department held that a "no-fault claim form completed by plaintiff and sent to defendant bus company, *together with correspondence from the attorney directed to defendant's claim department*, 'constituted in the aggregate a sufficient notice of claim [to the County] within the meaning of General Municipal Law 50–e.'" (*Miller v Liberty*

Lines, 208 AD2d 454, 454 [1st Dept 1994] [emphasis added], citing *Losada*.) In contrast, the Appellate Division, Second Department has squarely rejected the contention that a "no-fault application and various correspondence served upon the claims administrator for Liberty Lines constituted a sufficient notice of claim within the meaning of General Municipal Law § 50–e." (*Kossifos v Liberty Lines Tr.*, 277 AD2d 205, 205 [2d Dept 2000].)

Here, the correspondence from plaintiff's attorney served, in effect, as a cover letter to the no fault forms and the physician's narrative report; it did not add any significant details about the subject incident that was not already on the form. Given that the Appellate Division, First Department ruled in *Richardson* that a no-fault application alone does not constitute a notice of claim, applying *Losada* to this case would conflict with *Richardson*. Therefore, the Court must examine *Losada* and its progeny closely to determine whether *Losada* and its progeny are applicable in this case.

In *Losada*, Liberty Lines Transit, Inc. operated a bus owned by the County of Westchester, and the plaintiff's counsel sent two letters dated December 1 and 15, 1986, and a no-fault claim to Liberty Lines Transit Inc., which was handled by its general counsel. Liberty Lines Transit's general counsel was also "regularly engaged in representing the county in actions arising out of accidents occurring on

buses operated by Liberty Lines." (*Losada*, 155 AD2d at 337.) *Losada* itself does not set forth what was contained in the correspondence, but the letters were reproduced in the record on appeal to the Appellate Division. The letter dated December 1, 1986, stated:

> "This office has been retained by the above [Coralia Losada] in connection with a claim for damages as a result of your negligence in the ownership, operation, maintenance and control of your motor vehicle (your bus) on November 14, 1986.
>
> Kindly refer this letter to your automobile liability insurance carrier as of the date of this accident to apprise them of our retention in this matter. We strongly suggest that you do so since your failure to notify your insurance carrier of this accident may result in their disclaimer of coverage and your personal responsibility for all damages sustained by our client.
>
> If we fail to hear from either you or your insurance carrier within ten (10) days from the date hereof, we will be constrained to take further action against you in the best interests of our client."

(Record on Appeal in *Losada v Liberty Lines Tr.*, 155 AD2d 337, at A51.) The letter dated December 15, 1986 stated, in relevant part, "Please find enclosed complete No-Fault Application relative to above. Kindly commence payment of medical bills." (*Id.* at A52.)

A common denominator in *Losada* and its progeny is that "Liberty Lines' general counsel is regularly engaged in representing Westchester County in actions arising out of accidents occurring on buses operated by Liberty Lines. . ."

(*Gallagher v Liberty Lines Tr.*, 211 AD2d 440, 441 [1st Dept 1995]; *Miller v Liberty Lines Tr.*, 208 AD2d 454 [1st Dept 1994]; *see Santiago v Liberty Lines Tr.*, 259 AD2d 362 [1st Dept 1999], *affg* 1998 WL 35400908 [Sup Ct, NY County 1998].) Another common denominator is that, like the letters in *Losada*, the correspondence to Liberty Lines's general counsel stated that the claimant's injuries resulted from negligence, which would have alerted Westchester County to the likelihood of a tort action against it. In *Santiago*, the letter to Liberty Lines's General Counsel, which was reproduced in the record on appeal, stated, in relevant part,

> "Please be advised that I am the attorney for the above-named claimant, who was injured when she occupied Bus #20 Express of the Bee Line Bus Co. on April 16, 1996. The claimant sustained serious injuries as the result of the negligence of the driver."

(Record on Appeal in *Santiago v Liberty Lines Tr.*, 259 AD2d 362, at 55.)

Assuming, for purposes of argument, that *Losada* and its progeny are not limited to the cases against Liberty Lines Transit, Inc., the correspondence of plaintiff's attorney with the NYCTA is unlike the correspondence in *Losada*. The key difference is that the correspondence at issue here from plaintiff's attorney did not state that plaintiff's injuries resulted from negligence. Although the correspondence referred to a "claim for personal injuries," this is ambiguous as the

claim could be referring to the no fault claim; it does not alert the NYCTA of an intent to bring a tort action. In addition, the fact that a medical report - an initial narrative report from plaintiff's treating physician - is attached to the correspondence, is still not sufficient to constitute a notice of claim. (*Henderson v City of New York*, 259 AD2d 401 [1st Dept 1999].)

The correspondence from plaintiff's attorney served, in effect, as a cover letter to the no fault forms; it did not add any significant details about the subject incident that was not already on the no fault forms. The Appellate Division, First Department ruled in *Richardson* that a no-fault application alone does not constitute a notice of claim. It therefore follows that correspondence that merely tracks or repeats information contained in a no-fault application, coupled with the no-fault application, will not constitute a notice of claim. *Losada* and its progeny are inapposite, because the correspondence in *Losada* conveyed to the receiving government entity that something different than a no-fault claim was being asserted, that a tort claim was potentially in the offing. Therefore, the Court rejects plaintiff's argument that the correspondence and attached documentation dated February 14, 2012 and February 23, 2012 complied with notice of claim requirements.

Plaintiff argues that the correspondence and attached documentation met the

requirements of General Municipal Law § 50-e (3) (c)[1] because the NYCTA requested that the plaintiff be examined by a neurologist in a letter dated March 20, 2012 and the correspondence and attached documentation were received by the NYCTA within 90 days of the subject accident. Plaintiff's reliance upon General Municipal Law § 50-e (3) (c) is misplaced. "[S]ection 50–e (3) (c) was intended to cure improper methods of service, such as service by ordinary mail . . ." (*Scantlebury v New York City Health and Hosps. Corp.*, 4 NY3d 606, 611 [2005].) General Municipal Law § 50-e (3) (c) does not apply here because the NYCTA is contending that it was never served with a notice of claim. The NYCTA is not claiming that plaintiff failed to comply with notice of claim requirements due to a defect in the manner in which the notice of claim ought to have been served.

Pursuant to General Municipal Law § 50-e (5), the Court has discretion to grant leave to serve a late notice of claim under certain statutorily permitted circumstances.

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[1] General Municipal Law § 50-e (3) (c) provides,

> "If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received."

"In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50–e (5), the key factors considered 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.'"

(*Plaza v New York Health & Hospitals Corp. [Jacobi Medical Center]*, 97 AD3d 466, 467 [1st Dept 2012] [internal citations omitted]; *Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005].) "Proof of actual knowledge, or lack thereof, 'is an important factor in determining whether the defendant is substantially prejudiced by such a delay.'" (*Plaza,* 97 AD3d at 471; *see e.g. Padilla v Department of Educ. of City of N.Y.,* 90 AD3d 458 [1st Dept 2011] ["The most important factor that a court must consider in deciding such a motion is whether corporation counsel, . . . 'acquired actual knowledge of the essential facts constituting the claim within the time specified'"].)

However, as defendants indicate, the statute of limitations has run. (Diguida Affirm ¶ 9.) Where the statute of limitations has run, the Court is without discretion to permit service of a late notice of claim. "To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations,

thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so." (*Pierson v City of New York*, 56 NY2d 950, 954 -955 [1982].)

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted, the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: December 23 2013
New York, New York

ENTER:

J.S.C.