Stefansky v City of New York
2016 NY Slip Op 33094(U)
March 10, 2016
Supreme Court, Queens County
Docket Number: 700502/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Rafael Stefansky,

Petitioner,

- against -

The City of New York, New York City Department of Education, Board of Education of the City of New York, and Board of Education of the School District of the City of New York d/b/a New York City Department of Education,

Respondents.

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Index Number: 700502/16

Motion Date: 2/3/16

Motion Cal. Number: 154

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Notice of Petition-Petition-Affirmation-Exhibits.....	1-5
Affirmation in Opposition.....	6-7
Reply.....	8

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner for leave to serve a late notice of claim, nunc pro tunc, pursuant to General Municipal Law §50-e(5), is denied.

Petitioner allegedly sustained injuries as a result of a motor vehicle accident between the vehicle he was operating and a school bus owned by Grandpa's Bus Co., Inc. and operated by one Jacques Joseph at the intersection of Mott Avenue and Dickens Street in Queens County on February 3, 2015.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Since petitioners' cause of action accrued on February 3, 2015, they had until May 3,

2015 to file a notice of claim. Petitioner filed a notice of claim on January 15, 2016, over 8 months after the expiration of the 90-day deadline.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, foremost of which are whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Scolo v. Central Islip Union Free School Dist., 40 AD 3d 1104 [2nd Dept 2007]; Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to offer a cognizable excuse for his failure to serve respondents within the statutory period, failed to demonstrate that respondents acquired actual knowledge of the facts underlying the claim within 90 days of the incident or a reasonable time thereafter and failed to show that a late notice of claim would not substantially prejudice respondents.

Petitioner's counsel informs, and examination of the Court record reveals, that petitioner commenced an action against Grandpas' Bus Co. and Joseph on June 30, 2015 (Index No. 706844/15). Counsel contends that a response to the preliminary conference order in that case requiring Grandpa's to set forth its insurance coverage information was provided to petitioner on December 29, 2015, in which Grandpa's stated it was provided coverage under a Business Auto Liability policy issued by XL Group Insurance to the Department of Education (DOE).

Petitioner thereafter, on January 15, 2016, filed a notice of claim against respondents upon the ground that coverage of Grandpa's under an insurance policy issued to the DOE "rais[es] the question that the respondents were additional owners of the school bus at the time of the accident and therefore liable to plaintiff pursuant to Vehicle & Traffic Law §388 or respondents were additional employers of Joseph at the time of the accident and therefore liable to claimant pursuant to the doctrine of respondeat

superior". Counsel argues that since he did not discover this insurance information until December 29, 2015, not through any fault of his own but because of the dilatory conduct of respondents in providing such disclosure, petitioner had a reasonable excuse for his failure to serve a timely notice of claim against respondents. Counsel's argument is without merit.

A lack of awareness of the possibility of a lawsuit does not constitute a reasonable excuse as a matter of law (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]). Indeed, counsel still does not know whether respondents were co-owners of the school bus in question or whether Joseph was an employee of respondents, and, therefore, whether petitioner has a viable cause of action against them for the alleged negligent operation of the bus by Joseph either under vicarious liability or respondeat superior, but only speculates that the insurance coverage "raises a question" in this regard, a speculative conclusion amounting to a non-sequitur.

This Court also notes that although the Court should not ordinarily delve into the merits in determining an application for leave to serve a late notice of claim, it should deny leave to serve a late notice of claim where the claim is patently meritless, since it would make no sense to grant leave to serve a notice of claim under such circumstances (see Besedina v New York City Transit Authority, 47 AD 3d 924 [2nd Dept 2008]; Katz v. Town of Bedford, 192 AD 2d 707 [2nd Dept 1993]).

Merely because Grandpa's was included as a named insured under an insurance policy issued to the DOE does not of itself establish and is not even indicative that the municipal respondents were co-owners with the private bus company of the subject school bus or that Joseph was a co-employee of both respondents and the bus company, any more than a liability policy issued by an insurance carrier to a construction contractor naming the property owner as an additional insured indicates that the contractor was an employee of the property owner rather than an independent contractor and that the construction workers were employees of the property owner. Indeed, this Court can find no case law where the City of New York or the DOE was a co-title owner or co-registrant of a school bus with a private bus company or where a school bus driver was both the employee of the private bus company and the municipal entity.

Moreover, it is undisputed that the insurance policy was issued to the DOE, not to the City. The Department of Education of the City of New York (also known as the Board of Education) is a separate and distinct entity from the City of New York (see NY

Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]). Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Moreover, New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Therefore, since the only basis for seeking to file a notice of claim against the City is the insurance policy issued to the DOE, petitioner has failed to demonstrate a viable claim against the City as a matter of law.

Petitioner's counsel has also failed to demonstrate, and does not even contend, that respondents acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The Appellate Division, Second Department has emphasized that in determining whether to grant leave to file a late notice of claim, the acquisition by the municipality of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]).

The only other factor proffered by petitioners' counsel is his conclusory assertion that respondents cannot claim prejudice. However, it was petitioner who bore the burden of establishing lack of prejudice, not of respondents to establish prejudice. The only basis for counsel's argument that respondents cannot claim prejudice is his baseless contention that "respondents knew of their own involvement".

Moreover, the Court may not reach the statutory factor of prejudice where petitioner has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that respondents acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Indeed, it is the opinion of this Court that the passage of over 9 months from the deadline for filing a notice of claim has prejudiced respondents' ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]).

But in any event, as heretofore noted, petitioner's claim against respondents is patently meritless.

Finally, petitioner's counsel's contention that respondent Board of Education has not opposed the petition is without merit, and puzzling. The affirmation in opposition clearly states that it is by counsel representing both the City and the "Board of Education, d/b/a Department of Education", as petitioner denominated them. Moreover, this Court notes that the Board of Education became known as the Department of Education, and are the same entity.

Therefore, the untimely notice of claim served without leave of the Court was a nullity.

Accordingly the petition is dismissed. Respondents may enter judgment accordingly.

Dated: March 10, 2016

KEVIN J. KERRIGAN, J.S.C.

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