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

PRESENT: KATHRYN E. FREED **PART** 2

Justice

VINCENT MCNULTY,

Plaintiff,

- V -

METROPOLITAN TRANSPORTATION AUTHORITY, et al,

Defendants.

INDEX NO. 155727/2016

MOTION DATE 02/07/2017

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 ,were read on this motion to/for **serve late NOC**

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) **1,2 (exs 1-6)**

Answering Affidavits - Exhibits ..... No(s) **3**

Replying Affidavits ..... No(s) **No**

Cross Motion ..... **No**

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

Granted.

Plaintiff Vincent McNulty moves, by order to show cause, for leave to serve a late Notice of Claim ("NOC") against defendant The City of New York ("the City") pursuant to General Municipal Law § 50-e, and/or to deem his previously served NOC to be timely served *nunc pro tunc*, and granting such other and further relief as the Court may deem just and equitable. Defendant City opposes the motion. The Transit Authority defendants take no position on the instant motion.

Factual and Procedural Background:

Plaintiff was a sandhog and worked on numerous tunnel projects under New York City, including Water Tunnel Number 3, the Number 7 Subway Extension, the Second Avenue Subway Tunnel, and the East Side Access Tunnel. During these projects, plaintiff alleges that he was exposed to carcinogens, dust, fumes and other toxic substances and, as a result of such exposure, he has suffered various respiratory illnesses including asthma. On June 7, 2016, plaintiff served NOCs upon each municipality and public authority involved with each construction project, including the City. (See Exhibit 1).

Plaintiff thereafter served a summons and complaint on each municipality and public authority. On August 1, 2016, the City, by the Corporation Counsel, joined issue. Although there is some confusion as to which counsel is representing which party, and for which issues, for the purposes of this motion, it does not matter, since this motion only concerns that portion of the instant action in which the City is a party.

Although plaintiff believes he has already filed a timely NOC, he brings the instant motion in what he describes as "an exercise of caution" to "eliminate any ambiguity of confusion surrounding the [NOC] against [the City]." Petition, ¶ 7. This Court notes that, although plaintiff includes what he designates a petition, the underlying action is a summons and complaint and this Court therefore treats the within petition as an affirmation in support of the motion for leave to file a late NOC. See CPLR 2001.

Plaintiff, as noted *supra*, has worked on numerous tunnel projects and on July 31, 2015, he alleges that, while working on the East Side Access Tunnel, he was exposed to waterproofing dust and fumes from melting plastic. He went to a physician who diagnosed his condition as acute laryngitis. (See Exhibit 4).

On March 9, 2016, plaintiff sought further medical treatment and was diagnosed with chronic cough and acute laryngitis. (See Exhibit 5). On March 29, 2016, the doctors at Mount Sinai Occupational Medicine Clinic diagnosed plaintiff with dyspnea and chronic cough and occupational exposures to dust. (See Exhibit 6). On April 21, 2016, the doctors at Mount Sinai determined plaintiff was suffering from asthma. Plaintiff, through his attorney, Gregory Cannata, the principal of Gregory J. Cannata & Associates, LLP, states in the petition (deemed an affirmation), that, as of the date of the petition, August 8, 2016, he was not yet in possession of those records. (See Petition, ¶ 12).

Position of the Parties:

Plaintiff argues that, pursuant to CPLR 214 (c), the trigger date for toxic exposure is the date of discovery of the injury or the date the injury should have been discovered, and that the date that plaintiff was diagnosed with asthma was April 21, 2016. Therefore, plaintiff's NOC, which was filed on the City on June 7, 2016, was timely. However, since this Court could arguably find that the date on which the claim accrued was earlier than March 9, 2016, and that the NOC was late, plaintiff urges that he should be granted either leave to serve a late NOC or, pursuant to General Municipal Law § 50-e, asks that this Court deem his previously served NOC to be timely served *nunc pro tunc*.

Plaintiff argues that the City would not be prejudiced in any way if such relief were granted, since the City itself created, and is in possession of, air quality and daily work records which relate directly to his claims. Additionally, the contractors working in the Water Tunnel project prepare daily work records documenting the work being done and plaintiff's employers have records indicating plaintiff's daily work and the availability or lack thereof of respiratory protection.

In opposition, the City argues that the fact that plaintiff brings this motion reveals that "there are underlying issues relating to the timeliness of" plaintiff's NOC. (See Affirmation in Opposition to Order to Show Cause, ¶ 6). The City argues that, pursuant to General Municipal Law § 50-e(1)(a), the filing of a timely NOC is a condition precedent to bringing an action against any municipality. The City further notes that plaintiff initially sought out medical attention in July 31, 2015, and was diagnosed with acute laryngitis and upper respiratory infection. The City argues, in conclusory fashion, that, pursuant to CPLR 214 (c), the July 31, 2015 date was when plaintiff's symptoms first manifested themselves and should, therefore, be considered the trigger date and that the NOC was thus untimely.

The City also urges that plaintiff's motion must be denied not only because his NOC is untimely, but because plaintiff fails to meet the criteria set forth under General Municipal Law § 50-e for filing a late NOC. The City notes that there are three elements that must be met when granting an application to file a late notice of claim and that plaintiff herein fails to meet all three of them. Plaintiff must set forth: 1) a reasonable excuse for the delay in filing the NOC; 2) that the municipality had knowledge of the essential facts constituting the claim; and 3) that the municipality was not prejudiced by the late filing. The City notes that the plaintiff herein offers no excuse for the late filing of the NOC, and also fails to offer any evidence that the City acquired actual knowledge of the essential facts constituting the underlying claim. The City finally argues that the Court of Appeals has determined that it is plaintiff's burden to show that the City was not substantially prejudiced by the failure to timely file the NOC and that plaintiff also fails to meet this element as required by GML 50-e. The City argues that, because of the delay of over ten months in filing the NOC, it was substantially prejudiced, citing *Arias v. New York City Housing Authority*, 40 A.D.3d 298, 299 (1st Dept 2007), which held that "a delay of approximately seven months prejudiced respondent's ability to investigate..., identify witnesses, and collect their testimony based on fresh memories."

Conclusions of Law:

It is well settled that, in order to commence a tort action against a municipality, the claimant is required to serve a notice of claim within 90 days of the accrual of the alleged claim. *See* GML§ 50-e(1)(a); *Jordan v. City of New York*, 41 A.D.3d 658, 659 (2d Dept. 2007). The filing of such notice is a condition precedent without which an action against a municipality is barred.

However, GML§ 50-e(5) confers upon a court discretion to determine whether to permit the filing a late notice of claim. In making this determination, the court must consider the factors set forth in the statute, which include: (1) an explanation for the delay in filing a timely notice of claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days or a reasonable time thereafter; (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim. *See* GML§50-e(5); *William v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006); *Plaza v. New York Health & Hosps.* Corp., Jacobi Medical Center,

97 A.D.3d 466 (1st Dept. 2012), *affd* 21 NY3d 983 (2013). While this Court has discretion in determining a motion seeking permission to file a late notice of claim, the statute is remedial in nature and therefore must be liberally construed (*see Camacho v. City of New York*, 187 A.D.2d 262 [1st Dept. 1992]) and "should not operate to frustrate the rights of those with legitimate claims." *Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029, 1038 (1st Dept 2014) citing *Matter of Porcaro v City of New York*, 20 AD3d 357 (1st Dept 2005). Additionally, it is well settled that the presence or absence of any of the aforementioned three factors is not necessarily determinative (*see Bertone Commissioning v City of New York*, 118 AD3d 537 (1st Dept 2014) and the absence of a reasonable excuse for the delay is not necessarily fatal. *Matter of Sosa v City of New York*, ___AD3d___, 2015 NY App Div LEXIS 658 (1st Dept January 27, 2015), citing *Rosario v New York City Health & Hosps. Corp.*, 119 AD3d 490 (1st Dept 2014); *Matter of Thomas v City of New York*, 118 AD3d 537, 537-538 (1st Dept 2014); *see also Matter of Dell'Italia v. Long Is. R.R. Corp.*, *supra* at 759.

While it is true that plaintiff offers no evidence that the City acquired actual knowledge of the essential facts constituting the underlying claim on the earlier date, it is not true that plaintiff did not put forward a reasonable excuse for his delay. Plaintiff proffered an excuse by explaining why he is asking for leave to make what may be found to be a late filing of the NOC. If the Court agrees with plaintiff that the trigger date for the alleged illness occurred in 2016, then the original NOC was timely. However, as plaintiff noted, he was asking leave to file a late NOC in the event that this Court were to find that the earliest diagnosis, in June 2015, was the actual trigger date. Plaintiff argues that the mere diagnosis of acute laryngitis was not enough to alert plaintiff that he should file an NOC with the City. It was only the subsequent diagnoses, including that of asthma, that finally alerted plaintiff that he was suffering from a serious illness which could give rise to an action against the City. Plaintiff even says that this motion for leave to file a late NOC was being brought out of an abundance of caution. Given the nature of toxic exposure and the uncertainty of fixing the date when symptoms first appeared, amending the date of the NOC to encompass the earliest possible date seems a reasonable litigation strategy and certainly puts forth a reasonable excuse for the filing of a late NOC.

The City also argues that the primary purpose for the relatively short period set for the filing of the NOC, as required by GML 50 (e), is to afford the City the opportunity to promptly investigate the facts and circumstances of a claim while such information is fresh and readily available. Additionally, the City states that the Court of Appeals has determined that it is plaintiff's burden to show that the City was not substantially prejudiced by the failure to timely file the NOC. Therefore, in the instant matter, the City relies on the mere passage of time to imply it was prejudiced. The City also attempts to refute plaintiff's position, that all of the records that the City needs to rely on to refute plaintiff's claim are still readily available, by arguing that plaintiff offers no proof other than conclusory statements that these records are available. But the City's position that such records may not be available is equally conclusory and without proof.

Additionally, the City's position that it is plaintiff's burden to show prejudice is contrary to the recent holding of the Court of Appeals in *Newcomb v Middle Country Cent. School District*, 28 NY3d 455 (2016), 2016 N.Y. Slip Op. 08581. In that case, the Court of Appeals reversed the Supreme Court, which held that the burden was on petitioner to demonstrate that the municipality was not prejudiced, and further held that mere delay was enough to infer prejudice to a municipality. The Court of Appeals held "[w]e conclude that it is an abuse of discretion as a matter of law when, as here, a court determines, in the absence of any record evidence to support such determination, that a respondent will be substantially prejudiced in its defense by a late notice of claim." In that matter, the Court of Appeals found that, even though the municipal entity, a school district, did not have actual knowledge of the essential facts of the claim within the statutory period or a reasonable time thereafter, it could not infer prejudice absent specific facts. "Generic arguments and inferences will not establish 'substantial prejudice' in the absence of facts in the record to support such a finding." *Id.*

Finally, this Court notes that the instant application was brought well within the one year and ninety day period during which it is afforded broad discretion in deciding whether or not to allow the untimely filing of a notice of claim. *See* GML§ 50-e(5); *Pierson v City of New York*, 56 NY2d 950 (1982); *Nunez v City of New York*, 307 AD2d 218 (1st Dept 2003).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED AND ADJUDGED that the petitioner's motion to deem his notice of claim filed against defendant City of New York on June 7, 2016 to be timely filed *nunc pro tunc* is granted; and it is further,

ORDERED that the plaintiff shall serve his notice of claim upon the City Comptroller accompanied by a copy of this decision/order; and it is further,

ORDERED that petitioner shall appear for a 50-h hearing within 30 days of service of this order with notice of entry, if such hearing has not been conducted by that time; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: 2/9/2017

KATHRYN E. FREED, J.S.C.

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