SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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STEFANIE KIRCHHEIMER,

Plaintiff,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION and NEW JERSEY TRANSIT CORPORATION,

Defendants.

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Index No. 156233/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, defendant New Jersey Transit Corporation ("Defendant" or "NJ Transit") moves pursuant to CPLR 3211(a)(7)[1] to dismiss the complaint as against it on the ground that Plaintiff Stefanie Kirchheimer ("Plaintiff") failed to serve it with a notice of claim within 90 days of the accrual of her claim as required by New York's General Municipal Law ("GML") 50-e(1)(a)[2]. Plaintiff cross-moves pursuant to GML 50-e(5)[3] for leave to file a late notice of claim. For the reasons set forth below, NJ Transit's motion is denied and Plaintiff's cross-motion is granted.

Plaintiff's complaint alleges that she slipped and fell on uneven concrete on the platform of NJ Transit's Track 12 at Manhattan's Pennsylvania Station on February 11, 2016. As a result of the accident Plaintiff alleges that she sustained injuries to the tendons and ligaments in her left ankle.[4] Pursuant to GML 50-e(1)(a), Plaintiff had until May 11, 2016 to serve NJ Transit with a notice of

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[1] CPLR 3211(a)(7) provides that a party may move to dismiss a complaint on the ground that the pleading fails to state a cause of action.

[2] General Municipal Law 50-e(1)(a) provides "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate."; *cf* New Jersey Tort Claims Act ("NJSA") 59:8-3.

[3] GML 50-e gives the court the discretion to permit the service of a late notice of claim under certain conditions.

[4] See Plaintiff's Exhibit 1.

claim, but did not do so.[5] It is asserted that in early June of 2016 Plaintiff was advised for the first time that the injuries she sustained as the result of her accident required surgery. Shen then retained counsel on June 15, 2016 and underwent surgery on June 23, 2016.

On July 8, 2016, Plaintiff served defendant National Railroad Passenger Corporation ("Amtrak"), as owner, with a notice of claim. This was approximately 60 days after the GML 50-e notice of claim deadline expired. She did not serve a notice of claim upon NJ Transit. However, on July 14, 2016 Plaintiff received correspondence from Amtrak's then Acting Manager of Claims advising that she had forwarded a copy of the notice of claim to NJ Transit as part of a tender request.[6]

On July 26, 2016, Plaintiff commenced this action by filing a summons and verified complaint. Amtrak filed an answer on September 20, 2016. In lieu of an answer, NJ Transit filed this motion to dismiss.

It is undisputed for purposes of this motion that NJ Transit is protected by New York's General Municipal Law, which conditions the waiver of governmental immunity from suit upon the filing of a timely notice of claim. GML 50-e(1)(a) requires that a notice of claim be served upon public corporations like NJ Transit within ninety days after the claim arises. "The intent underlying the notice of claim requirement . . . is to protect the [public corporation] from unfounded claims and to ensure that it has an adequate opportunity 'to explore the merits of the claim while information is still readily available.'" *Porcaro v City of New York*, 20 AD3d 357, 357 (1st Dept 2005) (quoting *Teresta v City of New York*, 304 NY 440, 443 [1952]); *see also Brown v City of New York*, 95 NY2d 389, 392 (2000) ("To enable authorities to investigate, collect evidence and evaluate the merit of a claim,

[5] See Defendant's Exhibit C, Certification of Jim Turner dated September 26, 2016.

[6] Plaintiff's Exhibit 3.

persons seeking to recover in tort against a [public corporation] are required, as a precondition to suit, to serve a Notice of Claim").[7]

GML 50-e(5) authorizes courts to permit the filing of a late notice of claim in certain cases. Among the factors to be considered by a court in determining whether to permit service of a late notice of claim are whether the plaintiff had a reasonable excuse for the failure to serve a timely notice of claim, whether the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the defendant in maintaining its defense. *Id*; *see also Matter of Todd v New York City Health & Hosps. Corp.*, 129 AD3d 433, 433 (1st Dept 2015); *Matter of Hampson v Connetquot Cent. Sch. Dist.*, 114 AD3d 790 (2d Dept 2014). Trial courts have "broad discretion" to evaluate these factors. *See Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 465 (2016); *Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 265 (1980) (court's decision to grant or deny a motion to serve a late notice of claim is "purely a discretionary one."); *Matter of Jaffier v City of New York*, 2017 NY App. Div. LEXIS 2007, *2 (2d Dept March 22, 2017).

Plaintiff argues that she was excused from serving a notice of claim within the 90 day period after her accident because she did not know her particular injury would require surgery during that time period. After her accident Plaintiff allegedly sought medical care and was advised to wear a boot around her lower leg and foot for 4 to 6 weeks to see if her injury would heal. After that conservative treatment approach failed Plaintiff was advised that she needed surgery. At that point she retained counsel, underwent surgery, and served Amtrak with a notice of claim. Defendant argues that Plaintiff's decision to hold off on retaining counsel until after being advised she needed surgery does not excuse her lateness and unfamiliarity with the law.

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[7] Similar protections are afforded to public corporations like NJ Transit under New Jersey Law. *See* NJSA 59:8-3; NJSA 59:8-8.

Ignorance of the law and failing to recognize the severity of one's injuries are treated differently under New York law. Ignorance of the requirement to file a notice of claim is almost never considered a reasonable excuse. *See Matter of Hamilton v City of New York*, 145 AD3d 784, 785 (2d Dept 2016); *Rodriguez v New York City Health & Hosps. Corp.*, 78 AD3d 538, 538 (1st Dept 2010); *Harris v City of New York*, 297 AD2d 473, 473 (1st Dept 2002). Failing to recognize the severity of one's injuries, as Plaintiff asserts here, can be a reasonable excuse so long as there is medical evidence to support such claim. *See Gomez v City of New York*, 250 AD2d 443 (1st Dept 1998); *see also Mindy O. v Binghamton City School Dist.*, 83 AD3d 1335, 1337 (3d Dept 2011); *Matter of Friend v Town of W. Seneca*, 71 AD3d 1406 (4th Dept 2010); *but see Greene v City of Middletown*, 5 AD3d 384 (2d Dept 2004). Plaintiff does not submit any medical evidence on this motion. *See Benejan v NY City Transit Auth.*, 306 AD2d 1, 1 (1st Dept 2003); *Gomez,* 250 AD2d at 443. In some instances this could be fatal to her claim, but not here.

Plaintiff's failure to proffer a reasonable excuse is not fatal in this case because NJ Transit was put on actual notice "within 90 days following the[] accrual *or a reasonable time thereafter*" (*Matter of Maggio v City of New York*, 137 AD3d 1282, 1283 [2d Dept 2016], emphasis added) and there is no prejudice to NJ Transit (*Matter of Ramirez v City of New York*, 2017 NY App. Div. LEXIS 1790, *3 [2d Dept Mar. 15, 2017]; *Bass v New York City Tr. Auth.*, 140 AD3d 449 [1st Dept 2016]).

The record on this motion shows that there was merely a two-month delay in the filing of the notice of claim with respect to Amtrak, which in turn provided actual notice of the accident to NJ Transit. In the circumstances of this case, I find that this happened within a reasonable time after the 90-day period expired.

In terms of prejudice or lack thereof, Plaintiff asserts, and NJ Transit does not dispute, that the alleged defective condition has not been repaired. Also, neither party has identified any witnesses to the accident. In light of these facts the court is skeptical of Defendant's assertion that its defense and investigation of Plaintiff's claim will be hampered if this lawsuit is permitted to proceed. The only

"sticking point", according to Plaintiff, "is whether video surveillance capturing boarding patrons on February 11, 2016 at approximately 4:40PM still exists or [sic] archived."[8] NJ Transit responds that "Plaintiff acknowledge[s] that due to the delay Defendant was not able to preserve the video footage".[9] The reality is that Plaintiff does not know whether or not the video exists, nor does the court. NJ Transit has not submitted an affidavit from anyone employed by NJ Transit attesting to its video retention policy, how long it was required to maintain the video footage in question, when in fact the video footage in question was destroyed, and whether or not it undertook a search for the video footage upon receipt of the tender letter from Amtrak. For this reason Defendant's argument is rejected as unsupported.

The cases Defendant relies upon to show otherwise are distinguishable on their facts. In *Matter of Murray v Village of Malverne*, 118 AD3d 798, 800 (2d Dept 2014), for example, petitioner unintentionally served a notice of claim upon the wrong entity. Upon discovering such error, the petitioner waited too long to seek leave to serve the proper party and failed to submit evidence to rebut the respondent's contention that the delay would substantially prejudice its ability to conduct an investigation of the claim. Here, NJ Transit's claim of prejudice is unsubstantiated. In *Matter of Maggio*, 137 AD3d at 1283, the petitioner's assertion of law office failure was found to be an unacceptable excuse for a six-week delay in moving for leave to file a late notice. In this case, plaintiff retained counsel, underwent surgery, served Amtrak with a notice of claim, and received notice that such notice of claim was forwarded to NJ Transit, all in less than four weeks.

Therefore, in the exercise of its discretion and in the interests of justice, the court hereby grants Plaintiff an extension of time to make late service of its notice of claim upon NJ Transit.

Accordingly, it is hereby

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[8] Affirmation of Joshua Ram, Esq. dated October 8, 2016, ¶ 14.

[9] Affirmation of Jessica Anderson, Esq. dated October 25, 2016, ¶ 22.

ORDERED that NJ Transit's motion to dismiss is denied; and it is further

ORDERED that Plaintiff's cross-motion for leave to file a late notice of claim is granted; and it is further

ORDERED that Plaintiff shall serve a notice of claim upon NJ Transit in the form annexed to its moving papers no later than 20 days from the date of entry of this decision and order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 30 at 60 Centre Street, Room 412, on May 8, 2017, at 9:30AM.

This constitutes the decision and order of the court.

DATED: 3.30.17

SHERRY KLEIN HEITLER, J.S.C.