Muriqi v New York City Educ. Constr. Fund
2017 NY Slip Op 31368(U)
June 26, 2017
Supreme Court, New York County
Docket Number: 155897/15
Judge: Shlomo S. Hagler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
---X
ZENEL MURIQI and KOSOVARE MURIQI,

Petitioners,

-against-

THE NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND,

Respondent.
---X

Index No.: 155897/15

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, petitioners Zenel Muriqi ("Muriqi") and his wife Kosovare Muriqi (collectively, "Petitioners") move pursuant to General Municipal Law ("GML") § 50-e (5) ["Section 50-e (5)"] for leave to file a late notice of claim upon the respondent The New York City Educational Construction Fund ("Respondent"), or to deem the Notice of Claim attached to the instant Petition as timely served *nunc pro tunc* (Motion Sequence Number 001). Respondent opposes the Petition.

BACKGROUND FACTS

Muriqi was allegedly injured on July 8, 2014 while working as a laborer employed by non-party Metropolitan Sewer Inc. Muriqi claims that when using a jackhammer to uncover a water pipe in a trench in front of premises known as 252 East 57th Street, New York, NY (the "Premises"), his jackhammer came into contact with high voltage electrical wires and cables. According to Muriqi, he was using the jackhammer to remove a fire hydrant and water line. Muriqi alleges that, as a result, he received a severe electrical shock which propelled him to the ground (Notice of Motion, Muriqi Affidavit, ¶

3; Notice of Motion, Exhibit "A" [Notice of Claim against Respondent], ¶ 3).

Petitioners, by their former attorney, served a timely Notice of Claim upon The City of New York (the "City") on or about September 11, 2014 alleging among other claims, violations of Labor Law sections 200, 240(1) and 241(6) (Notice of Motion, Exhibit "B" [Notice of Claim against the City]).[1] A hearing pursuant to GML § 50-h (the "50-h Hearing") was conducted on December 1, 2014 (Notice of Motion, Exhibit "C"). It is undisputed that although Respondent is the fee owner of the Premises, Petitioners failed to serve a Notice of Claim upon Respondent within ninety days after the instant claim arose (Notice of Motion, Affirmation of Gail S. Kelner ["Kelner Affirmation"], ¶ 7; Affidavit in Opposition, Affidavit of Jennifer Maldonado, Executive Director of Respondent, sworn to on June 23, 2015 ["Maldonado Affidavit"]). The time to serve Respondent with a timely Notice of Claim expired on October 6, 2014.

On or about February 3, 2015, Petitioners' current counsel, Kelner & Kelner, Esq. ("Kelner") was retained and substituted for Petitioners' former counsel (Notice of Motion, Exhibit "D" [Retainer Statement filed with the Office of Court Administration]). Kelner claims that upon receipt of the file from Petitioners' former counsel, Kelner conducted an "extensive search of the property records" for the Premises which revealed that the City had conveyed the Premises to Respondent by deed, dated April 28, 2010

[1]The Notice of Claim was timely served within ninety days after the claim arose (on July 8, 2014).

(Notice of Motion, Kelner Affirmation, ¶ 9).[2] Specifically, Kelner allegedly searched through the City's records using ACRIS (Notice of Motion, Kelner Affirmation, ¶ 9; Notice of Motion, Exhibit "E" [Deed]).[3]

On or about June 12, 2015, approximately eight months after the 90-day period to serve a Notice of Claim expired, Petitioners filed the instant Petition seeking leave to serve and file a late Notice of Claim, or to deem the Notice of Claim attached to the Petition as Exhibit "A" timely served *nunc pro tunc*.

DISCUSSION

Notice of Claim

Pursuant to GML § 50–e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective respondent "within ninety days after the claim arises" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016]; *see Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 674 [2016]. Here, it is undisputed that Petitioners failed to file a timely Notice of Claim on Respondent. The instant proceeding for leave to serve a late notice of claim was commenced on or about June 12, 2015, eleven months after Muriqi's July 8, 2014 accident. GML Section 50-e (5) which governs applications to file a late notice of claim, permits a court in its discretion to extend the time for a petitioner to serve a notice of

---

[2]Kelner claims that Petitioners' former counsel refused to turn over the case file until on or about March 3, 2015 (Notice of Motion, Kelner Affirmation, ¶ 9).

[3]A confirmatory deed was executed on February 5, 2014 (*Id.*, Exhibit "E").

claim. Under that section, a court is required to consider factors, including as is pertinent here, "whether there was [(1)] a reasonable excuse for the delay [in service], [(2)] actual knowledge on the part of [the respondent] of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and [(3)] substantial prejudice to [the respondent] due to the delay" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 463). "The lower courts have broad discretion to evaluate the factors set forth in General Municipal Law § 50-e (5). At the same time, a lower court's determinations must be supported by record evidence" (*Id.* at 465 [internal citations omitted]). "[T]he presence or absence of any one of the foregoing factors is not determinative" (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]).

It is well established that "the absence of a reasonable excuse is not, standing alone, fatal to [an] application" (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016] [internal citation and quotation omitted]). With respect to the actual knowledge requirement, Section 50-e (5) "'contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory'" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]). Regarding the determination of prejudice under Section 50-e (5), a petitioner must "make an initial showing that the public corporation will not be substantially prejudiced and then [t]he public corporation [must] rebut that showing with particularized evidence" (*Matter of*

Newcomb v Middle County Cent. Sch. Dist., 28 NY3d at 467).

Reasonable Excuse

In the Affidavit of Muriqi, sworn to on June 9, 2015, he claims that his former attorneys failed to properly advise him about the ownership of the Premises and that the owner of the Premises might be responsible for his accident (Notice of Motion, Muriqi Affidavit, ¶ 4). Petitioners state that after the ninety-day period for filing a Notice of Claim had already expired, Kelner was retained as counsel for Petitioners on February 3, 2015 and received the file from Petitioners' former attorney on March 3, 2015. Kelner's contends that a review of the file and "extensive" search of City property records, revealed that the Premises are owned by Respondent through a complex ownership structure. At oral argument held on March 14, 2016, this Court ruled that law office failure or the failure to conduct the proper due diligence to ascertain the proper owner of the Premises is not an acceptable excuse under Section 50-e (6) as a matter of law (Tr. Oral Argument, March 14, 2016 at 15, 22; *see Matter of Abramovitz v City of New York*, 99 AD3d 1000, 1001 [2d Dept 2012] ["petitioner's excuse that he only recently came to realize that he may now have a claim against [the New York City Transit Authority] [in addition to the City of New York which was timely served] was unacceptable"; *Bridgeview at Babylon Cove Homeowners Assn., Inc. v Incorporated Vil. of Babylon*, 41 AD3d 404, 405 [2d Dept 2007] ["[t]he plaintiff's failure, however, to properly research the entity that owned the dock in the first instance was not an acceptable excuse"]; *Sief v City of New York*, 218 AD2d 595, 596 [1st Dept 1996] [petitioner's attorney's affirmation

stating that the firm 'only recently' became aware that the owner of the premises was the New York City Housing Authority, "amount[ed] to nothing more than law office failure, *i.e.*, to properly research what entity owned the property in the first instance. The fact that the City of New York was properly and timely served is of no moment as the owner of the building ... could easily have been ascertained"]; *Pavone v City of New York*, 170 AD2d 493, 493 [2d Dept 1991] [plaintiff failed to offer an adequate excuse. "Although a notice of claim was served within 90 days, it was served on an improper entity (the New York City Hous. Auth.) despite the fact that the correct entities (the municipal defendants herein) easily could have been ascertained"]).

Actual Knowledge

Petitioners claim that the deed evidencing a conveyance of the Premises from the City to Respondent evidences that the City retained a reversionary interest in the Premises. Petitioners argue that as a result of this shared or 'intermingled' interest in the Premises, Respondent was put on notice when the City was served with a timely Notice of Claim. Petitioners claim therefore that both entities have an ownership interest in the Premises.

Petitioners argue that the City and Respondent, in addition to the general contractor and the owner of the ground lease for the Premises under construction, are all insured under the same "wrap" insurance policy and are in addition represented by the same counsel. Under such circumstances, Petitioners contend that receipt of a Notice of Claim by the City imputes knowledge to Respondent (Tr. Oral Argument, March 14, 2016

at 11, 14; Tr. Oral Argument, June 20, 2016 at 11-13, Tr. Oral Argument, July 12, 2016 at 7-9; Reply Affirmation at ¶ 3; Supplemental Affirmation in Further Support at ¶ 9). In opposition, Respondent proffers the Maldonado Affidavit, which states that the City and Respondent are two separate entities, the Respondent was not involved in the subject construction project, there were no employees of Respondent working at the job site, Respondent did not enter into any contracts with the general contractor or subcontractors, Respondent was not aware of Muriqi's accident until the filing of the instant Petition, and Respondent was not provided with any accident reports, memoranda, notices or other documents referencing Muriqi's accident (Affidavit in Opposition, Maldonado Affidavit, ¶¶ 5-8).

At oral arguments held on March 14, 2016, June 20, 2016 and July 12, 2016, Petitioners again argued that the City and Respondent were insured under the same wrap insurance policy and were represented by the same counsel in connection with the subject project, and as such, Respondent acquired actual knowledge of the accident (Tr. Oral Argument, March 14, 2016 at 14; Tr. Oral Argument June 20, 2016 at 10-12; Tr. Oral Argument, July 12, 2016 at 3, 8, 14). Respondent conceded that there was one wrap policy but stated that the entities had different insurers (Tr. Oral Argument, March 14, 2016 at 14; Tr. Oral Argument, July 12, 2016 at 8-9). Petitioners further claimed, without providing evidentiary support, that a claim letter was sent to such insurance company within 90-days after the accident, and as a result, respondent acquired knowledge of the accident within the applicable ninety-day period (Tr. Oral Argument, June 20, 206 at 10-

11). Even were this Court to credit Petitioners' counsel's testimony at oral argument, Petitioners have failed to cite any appellate authority to support their argument that having the same wrap insurance policy is sufficient to establish that the City and Respondent are one entity for purposes of imputing knowledge of the City to Respondent.[4] In light of the foregoing, this Court determined that Petitioners failed to establish that Respondent acquired actual knowledge of the essential elements constituting the claim within the 90-day statutory period or within a reasonable time thereafter (Tr. Oral Argument, March 14, 2016 at 15, 22).

Prejudice

In their moving Petition, Petitioners argue that (1) the actual knowledge acquired by the City which had full opportunity to investigate the accident; (2) the availability of the 50-h Hearing transcript to Respondent; and (3) the fact that the liability of Respondent

---

[4]Petitioners rely on an unreported case (*McGovern v Port Authority of New York and New Jersey,* 2013 WL 1232738 [trial court decision, March 21, 2013] [Reply Affirmation at ¶¶3, 12]). *McGovern* suggests that notification to a joint insurer "weighs heavily in plaintiff's favor" with respect to the issue of notice to the proposed municipal defendant (*McGovern v Port Authority of New York and New Jersey,* 2013 WL 1232738 * 5; Tr. Oral Argument, June 20, 2016 at 12; Tr. Oral Argument, July 12, 2016 at 9). However, in that case, a letter from defendant's counsel indicated that the proposed municipal defendant received notice of the essential elements of plaintiff's claim one day after the accident, the subject certificate of insurance listed the proposed municipal defendant as an "additional insured" and the alleged condition was transitory (*see* Tr. Oral Argument, dated March 14, 2016 at 9-10; Tr. Oral Argument, dated June 20, 2016 at 12; Tr. Oral Argument, dated July 12, 2016 at 9-10). Petitioners' reliance on *Matter of Donaldson v State of New York,* 167 AD2d 806, 806 [3d Dept 1990] is also inapposite. There, petitioner gave a statement to a representative of the worker's compensation and liability insurance carrier for the petitioner's employer, which was obligated to defend and indemnify the proposed State respondent. The respondent's own records contained a report by a State inspector regarding the accident demonstrating actual knowledge (*see* Tr. Oral Argument, June 20, 2016 at 12-13).

is derivative - i.e. Respondent will have recourse against the general contractors and any sub-contractor - demonstrate that Respondent is not prejudiced by Petitioners' delay in serving a Notice of Claim. In reply, Petitioners contend for the first time that given that the subject construction site was transient, a late Notice of Claim would not be prejudicial to Respondent. In supplemental briefing memoranda submitted at the request of this Court, Petitioners argue further that they have met their burden demonstrating that Respondent is not prejudiced by service of the late Notice of Claim given that (1) Petitioners attached to the motion papers documentary evidence, including the transcript of Muriqi's examination at the 50-h Hearing, which included names of witnesses to the accident and photographs of the subject trench and pipes; (2) the condition at the construction site was transitory, and as such Respondent is not prejudiced by the passage of time; (3) Respondent is vicariously liable under a wrap insurance police with the City; and (4) Respondent has failed to sufficiently demonstrate prejudice (Supplemental Affirmation in Further Support; Tr. of Oral Argument, June 20, 2016 at 3-12; Tr of Oral Argument, July 12, 2016 at 3-11).

In opposition, Respondent argues (1) Petitioners failed to satisfy their initial burden showing the lack of prejudice, meaning that the burden never shifted to Respondent to demonstrate prejudice; (2) even if the burden shifted, Respondent has made a sufficient showing of prejudice. Respondent contends that it sufficiently demonstrated that it was prejudiced on grounds that (1) the Maldonado Affidavit establishes that Respondent did not receive timely actual knowledge as Respondent only

became aware of the accident after being served with the instant Petition eleven months after the accident; (2) this late notice precluded Respondent from conducting a timely investigation "strongly favor[ing] a finding that Respondent was prejudiced by the delay"; (3) the evidence obtained at the 50-h Hearing was not contemporaneous with the accident; and (4) unlike conditions such as snow and ice, garbage or debris, the condition of the subject trench or electrical wires is not transitory (Supplemental Affidavit in Further Opposition; Tr. of Oral Argument, June 20, 2016 at 12-13; Tr. of Oral Argument, July 12, 2016 at 11-14).

Having ruled that Petitioners failed to make a sufficient showing demonstrating that Respondent acquired actual knowledge of the essential elements of Petitioners' claim, and that Petitioners failed to provide a reasonable excuse for the failure to serve a Notice of Claim upon Respondent within the statutory time frame, the only issue remaining for the Court to consider is whether despite lack of such actual knowledge and the failure to demonstrate a reasonable excuse, the late filing of the Notice of Claim would result in substantial prejudice to Respondent.

In *Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 465-468 [2016]], the Court of Appeals clarified the burden of proof regarding the issue of substantial prejudice which a court must consider in determining whether to extend the time for a petitioner to serve a Notice of Claim. In that case, the Court upheld the lower courts' determinations that there was a reasonable excuse for the delay in serving a notice of claim on the respondent school district, and that the school district did not have actual

knowledge of the essential facts constituting the claim (*Id.* at 465).

With respect to the issue of a showing of prejudice, the Court held "that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice" (*Id.* at 466). "The rule we endorse today-requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence-strikes a fair balance" (*Id.* at 467).

Here, Petitioners argue that the evidence provided in the Petition for leave to serve a late Notice of Claim includes the transcript of the 50-h Hearing held against the City approximately five months after the accident.[5] The transcript provides names of witnesses to the accident including co-workers, a City inspector and his boss (Notice of Petition, Exhibit "C" [50-h Hearing transcript] at 19-23).[6] The availability of such evidence in the instant matter satisfies Petitioners' burden of showing no substantial prejudice to Respondent under the framework set forth in *Matter of Newcomb* (*Cf Mehra*

[5]As in *Matter of Newcombe*, plaintiff timely served a Notice of Claim upon the other municipal entity, here the City, involved in this matter (*see Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 461; *cf Grajko v City of New York*, 2017 WL 2269966 [1st Dept 2017]).

[6]Muriqi referred to the City inspector as "Inspector Terry" and the inspector's phone number was subsequently provided in an Errata Sheet. Muriqi's boss at his employer was referred to by his last name (Notice of Petition, Exhibit "C" [50-h transcript] at 21-23; [Errata Sheet] at 1).

v City of New York, 112 AD3d 417, 418-419 [1st Dept 2013] [the respondent was denied the opportunity to search for witnesses]; *McClatchie v City of New York*, 105 AD3d 467, 468 [1st Dept 2013] [14-month delay deprived the respondent of a reasonable opportunity to locate witnesses]; *Matter of Rivera v New York City Hous. Auth.*, 25 AD3d 450, 451 [the delay "compromised defendants ability to identify witnesses"]).[7]

Turning to whether Respondent here has sufficiently rebutted Petitioners' showing with particularized evidence, this Court "must consider whether record evidence indicates that substantial prejudice [to Respondent] does in fact exist" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466). "Generic arguments and inferences will not establish "substantial prejudice" in the absence of facts in the record to support such a finding" (*Id.*). Although the Court of Appeals recognized that a lengthy delay in service and lack of knowledge can affect whether service of a late notice of claim substantially prejudices a public corporation, a separate inquiry under the statute must be made to determine whether the public corporation is substantially prejudiced (*Id.* at 467).[8] "The public corporation [i]s in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice" (*Id.* at 467-468).

---

[7]Petitioners also argue that the subject condition is transitory, meaning that even if the Notice of Claim had been timely served, Respondent would have still have been unable to investigate within the statutory time frame. Petitioners' contention that the condition was transitory or fleeting is without merit (*Cf Matter of Rivera v City of New York*, 127 AD3d 445 [1st Dept 2015] [debris]; *Gamoneda v New York City Bd. of Educ.*, 259 AD2d 348 [1st Dept 1999] [icy condition]; *Williams v City of New York*, 229 AD2d 114 [1st Dept 1997] [snow and ice]).

[8]However, "substantial prejudice may not be inferred solely from the delay in serving a notice of claim" (*Id.* at 467, fnt 7).

Respondent argues that given that it did not have actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, Respondent was unable to investigate the claim since it could not investigate an accident it did not even know occurred.[9] "[A] finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 465-466). The public corporation must offer "particularized evidence" (*Id.* at 467).

Here, Respondent has failed to make such a showing. The Maldonado Affidavit merely establishes that Respondent had no knowledge of Petitioners' claim and was therefore not able to conduct a timely investigation. Although Respondent's lack of knowledge of the essential facts constituting the claim, precluding a timely investigation, may be prejudicial,[10] Respondent has presented no evidence that substantial prejudice does in fact exist. Respondent has failed to provide admissible evidence in affidavit form demonstrating how it was prejudiced despite the record made in the 50-h Hearing against the City, which included the names of witnesses to the subject accident and photographs

[9]In support, Respondent cites *Goodwin v New York City Hous. Auth.*, 42 AD3d 63 [1st Dept 2007] and *Williams v City of New York*, 229 AD2d 114 [1st Dept 1997]. The facts in both *Goodwin* and *Williams* are inapposite and make determinations with respect to amending notices of claim.

[10]"[P]roof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by [a] delay" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006].

of the construction site. The Court of Appeals recognized "[t]here may be scenarios where, despite a finding that the public corporation lacked actual knowledge during the statutory period or a reasonable time thereafter, the public corporation is not substantially prejudiced by the late notice" (*Id.*).

CONCLUSION

Accordingly, it is hereby

ORDERED, that the Petition of Petitioners Zenel Muriqi and Kosovare Muriqi pursuant to General Municipal Law § 50-e (5) for leave to serve and file a late Notice of Claim on Respondent The New York City Educational Construction Fund is granted; the late Notice of Claim attached to the Petition as Exhibit "A" is deemed to have been served *nunc pro tunc.*

Dated: June 26, 2017

ENTER:

J.S.C.

SHLOMO HAGLER

J.S.C.