Icarus Assoc. v New York City School Constr. Auth.
2010 NY Slip Op 33883(U)
November 10, 2010
Supreme Court, New York County
Docket Number: 110062/09
Judge: Marylin G. Diamond

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

ICARUS ASSOCIATES,

Plaintiff,

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY et al.,

Defendants.

INDEX NO. 110062/09

MOTION SEQ. NO. 002

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 002 and 003 are consolidated herein for decision. The plaintiff Icarus Associates is the owner of a residential building located on West 204th Street in Manhattan. In this action, it alleges that the defendants, in constructing a New York City public school on adjacent property, has caused damage to plaintiff's building. The complaint seeks monetary damages. The defendants are the New York City School Construction Authority ("SCA") and two of the companies which it retained to perform the construction work (T.A. Ahern Contractors Corp. and Willis of New York, Inc.). In motion sequence number 002, the plaintiff seeks leave, pursuant to General Municipal Law §50-e(5), to serve a late notice of claim *nunc pro tunc* on the SCA. In motion sequence number 003, the SCA and Ahern have moved to dismiss the proceeding as against them on the ground that they were never served with the summons with notice and that the court therefore lacks personal jurisdiction over them. They also argue that the proceeding must be dismissed as against SCA, pursuant to GML § 50-i, because a timely notice of claim was never served.

Discussion

A. Personal Jurisdiction - - This action was commenced on July 16, 2009 when plaintiff filed a summons with notice with the Clerk's Office. On that same date, plaintiff moved, by order to show cause, for a preliminary injunction enjoining the defendants from entering or otherwise trespassing on its property. The plaintiff also sought a temporary restraining order. The defendants were given prior notice of this application for a TRO and Assistant Corporation Counsel Lisa Gallaudet, on behalf of only the SCA, submitted papers in opposition thereto and appeared before the court to argue the matter. Following argument, the court (Karen Smith, J.) signed the order to show cause and issued a temporary restraining order. In doing so, she directed that personal service of a copy of the order and the papers upon which it was based, along with a copy of the summons with notice, be made upon the SCA and Ahern. Thereafter, Assistant Corporation Counsel Gallaudet submitted opposition papers on behalf of the SCA and again appeared before Justice Smith to argue against the plaintiff's application. By order dated September 19, 2009, Justice Smith denied the plaintiff's motion for a preliminary injunction.

The plaintiff's attorney, Jeffrey Klarsfeld, has conceded that he never personally served the SCA at the appropriate address where personal service upon this public authority is to be made. Nor was a copy of the summons with notice served at Ahern's place of business. Rather, Mr. Klarsfeld argues that effective service was made upon these two defendants on the day the TRO was argued when he handed a copy of the summons with notice to Assistant Corporation Counsel Gallaudet. He also points out that, in opposing

the preliminary injunction, Ms. Gallaudet never raised the issue of personal jurisdiction.

Clearly, the personal service requirements of article 3 of the CPLR were not satisfied when Mr. Klarsfeld handed a copy of the summons and notice to Assistant Corporation Counsel Gallaudet on the day she appeared before Justice Smith to argue against the issuance of a TRO. Indeed, plaintiff has not cited any legal support for such a position.

Nevertheless, CPLR 320(b) provides that "an appearance of the defendant is equivalent to personal service of the summons" unless an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or answer. CPLR 320(b) has been construed to confer jurisdiction not only over a defendant who files a formal notice of appearance, but also over a defendant who makes an informal appearance before the court and fails to raise a jurisdictional objection (1) in the course of such an appearance, (2) in a motion to dismiss made prior to the expiration of the time to answer or (3) in the answer. *See Matter of Clarkstown v. Howe*, 206 AD2d 377 (2nd Dept 1994); *Rubino v. City of New York*, 145 AD2d 285, 288-289 (1st Dept 1989); *Sibley v. Lake Anne Realty Corp.*, 136 AD2d 619 (2nd Dept 1988). In *Clarkstown*, although service of process was defective, the respondent state commissioner appeared before the trial court in opposition to the petitioner's application for a preliminary injunction. The Second Department rejected the petitioner's argument that this informal appearance constituted a waiver of the respondent's jurisdictional objection. This conclusion was expressly based on the fact that the respondent had raised the issue of lack of jurisdiction personal jurisdiction in opposition to the petitioner's application for injunctive relief and had thereafter moved for dismissal prior to the expiration of his time to answer. *See Matter of Clarkstown v. Howe*, 206 AD2d at 377. It is clearly implicit in this decision that a defendant's informal appearance opposing a preliminary injunction motion will, under CPLR 320(b), constitute a waiver of its jurisdictional objection unless the defendant raises such an objection at the time of such an appearance and/or by a timely motion to dismiss.

Here, although Assistant Corporation Counsel Gallaudet appeared on behalf of the SCA in opposition to the plaintiff's motion for a preliminary injunction, she never raised the SCA's jurisdictional objection in her opposition papers or at oral argument. Moreover, following the ineffective service upon her of a copy of the summons with notice, neither she nor any other attorney representing SCA moved to dismiss the proceeding within the time to respond. Under the circumstances, the court is persuaded that Ms. Gallaudet's informal appearance before Justice Smith must be considered, under CPLR 320(b), an appearance which is equivalent to personal service upon the SCA.

As such, plaintiff's subsequent service of the complaint upon SCA by mailing a copy to Ms. Gallaudet was, pursuant to CPLR 2103(b), entirely proper and effective. Moreover, since the SCA never demanded a copy of the complaint, the fact that it was not served until May 24, 2010 is of no legal significance. Under the circumstances, the SCA's motion to dismiss the proceeding as against it for lack of personal jurisdiction must therefore be denied.

However, as to defendant Ahern, there is no evidence that it was ever served with a copy of the summons with notice. Indeed, Ms. Gallaudet's opposition papers expressly stated that she was only appearing on behalf of the SCA. Thus, her informal appearance cannot be imputed to Ahern. Since Ahern was never served with a copy of the summons with notice, the proceeding must be dismissed as against this defendant, pursuant to CPLR 306-b.

B. Leave to Serve Late Notice of Claim - - Under section 50-i(1) of the General Municipal Law, a notice of claim is a condition precedent to commencing an action against a municipality or public

authority and must be filed within 90 days after the cause of action arises. However, under GML § 50-e(5), even if a party commences an action without having first filed a notice of claim, it may thereafter move for leave to file a late notice and if the motion is granted, the action may proceed. Section 50-e(5) provides that such a motion must be brought within the time limited for the commencement of an action by the claimant against the public authority. Under GML § 50-i(1), an action against a public authority must be brought within one year and 90 days after the happening of the event upon which the claim is based. *See Catterson v. Suffolk County Dept. of Health Servs.*, 49 AD3d 792, 795 (2nd Dept 2008); *Maxwell v. City of New York*, 29 AD3d 540, 541 (2nd Dept 2006). Here, the plaintiff's motion for leave to serve a late notice of claim was brought on May 27, 2010. Thus, it is timely as to any claims which accrued on or after February 26, 2009.

In this respect, the plaintiff's proposed notice of claim asserts that SCA has trespassed on and damaged plaintiff's property from January 1, 2009 through the present. In his affirmation in support of plaintiff's motion, Mr. Klarsfeld states, based on his personal knowledge, that the damage to plaintiff's property did not first occur until April 3, 2009 and that there was subsequently additional damage to the building. Thus, it appears that most, if not all, of the monetary damages which plaintiff seeks because of damage to its building arise from claims which accrued on or after February 26, 2009. Although the plaintiff's motion is untimely with respect to any claims which accrued before this date, it is nevertheless timely with respect to all other claims.

As to the merits of the application, GML § 50-e(5) specifies that in determining whether to grant an application to file a late notice of claim, the court shall consider, *inter alia*, whether 1) the claimant was mentally or physically incapacitated before the time limited for service of the notice of claim, 2) the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day period or a reasonable time thereafter and 3) the delay in serving the notice of claim substantially prejudiced the municipality in its defense on the merits. The most important of these factors is whether the municipality acquired actual knowledge of the essential facts within the 90-day period or a reasonable time thereafter. *See Casias v. City of New York*, 39 AD3d 681, 682 (2nd Dept 2007).

Here, the SCA clearly acquired knowledge of the facts underlying the plaintiff's claims within a reasonable time after the expiration of the 90-day period since this lawsuit was brought 104 days after plaintiff's property was allegedly first damaged by the defendants' work on April 3, 2009. Indeed, SCA's appearance in opposition to plaintiff's preliminary injunction motion necessarily entailed a familiarity with these claims. Moreover, between April 7, 2009 and the commencement of this action, Mr. Klarsfeld sent the SCA numerous letters complaining about the damage to plaintiff's building which the construction work had caused and seeking compensation. Although the SCA suggests that it has been substantially prejudiced by the petitioner's delay in filing a notice of claim, this contention is entirely conclusory and devoid of any details or explanation. *See Matter of Welch v. Bd. of Educ. of Saratoga Central School District*, 287 AD2d at 764; *Dunne v. Grello*, 180 AD2d 662 (2nd Dept. 1992); *Matter of Bowen v. Salamanca District Hosp. Auth.*, 99 AD2d 658 (4th Dept. 1984). Contrary to the SCA's assertion, there is nothing in the record which indicates that the plaintiff refused to allow any of the defendants to enter onto its property in order to inspect and ascertain the alleged damage.

It is true that the plaintiff has not provided a reasonable excuse for its failure to file a notice of claim. Indeed, Mr. Klarsfeld has admitted that he merely forgot to do so. Nevertheless, this absence of an excuse does not require that plaintiff's motion be denied since the presence of an excusable delay is only one of the statutory factors the court must consider in determining whether to permit a late filing. *See Salvaggio v. Western Regional Off-Track Betting Corp.*, 203 AD2d 938 (4th Dept. 1994); *Matter of*

Darmstedter v. Buffalo Sewer Authority, 96 AD2d 1148 (4th Dept. 1983). As already discussed, plaintiff has satisfied the most important factor by showing that the SCA acquired actual knowledge of the essential facts within a reasonable time after the expiration of the 90-day period. Given that the SCA had actual and timely notice of the essential facts about the plaintiff's claim and has not shown that it was prejudiced by the plaintiff's failure to file a timely notice of claim, the court is persuaded that the plaintiff's motion for leave to serve and file *nunc pro tunc* the late notice of claim which is attached to its motion papers should be granted to the extent that it seeks monetary relief for damage to its property occurring on or after February 26, 2009. *See Matter of Reisse v. County of Nassau*, 141 AD2d 649, 651 (2nd Dept. 1988).

Accordingly, in motion sequence number 002, the plaintiff's motion for leave to serve and file *nunc pro tunc* the late notice of claim which is attached to its motion papers is hereby granted to the extent that it seeks monetary relief for damage to its property occurring on or after February 26, 2009. The notice of claim shall be deemed served upon service on the SCA of a copy of this order with notice of entry. In motion sequence number 003, the defendants' motion to dismiss is granted to the extent that the proceeding is hereby dismissed as against defendant Ahern. The motion is otherwise denied.

ENTER ORDER

Dated: 11/10/10

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [ ] FINAL DISPOSITION

[X] NON-FINAL DISPOSITION