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

PRESENT: ALICE SCHLESINGER PART 16
Justice

Index Number : 102836/2011
ACOSTA, MARY
VS.
BENEPE, ADRIAN
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

UNFILED JUDGMENT

The judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition for leave to file a late notice of claim is granted in accordance with the accompanying memorandum decision.

Dated: AUG 12 2011

Alice Schlesinger
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

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MARY ACOSTA,

Petitioner,

Index No. 102836/11
Motion Seq. No. 001

-against-

ADRIAN BENEPE, as Parks Commissioner of the City of New York and THE CITY OF NEW YORK,

Respondents.

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SCHLESINGER, J.:

Before the Court is a petition wherein Mary Acosta is asking the Court to permit her leave to file a late notice of claim. Respondent opposes. The relevant dates are as follows. While arguably still on probation as an Urban Park Ranger, petitioner was terminated from that position on July 9, 2010. This would mean that a timely notice of claim would have to have been filed by October 7, 2010. It was not, although on November 5, 2010, Ms. Acosta commenced an Article 78 proceeding asking for reinstatement.[1] On March 8, 2011 she filed this petition, five months late and four months after the Article 78 proceeding had been commenced.

Other dates are significant as well. After her termination, Ms. Acosta sought counsel from attorney Sidney Baumgarten. On August 16, 2010, slightly more than a month after her termination, Mr. Baumgarten wrote a letter to the Commissioner of the Department of Parks, Adriane Benepe, petitioner's former employer. In this letter he told

[1]The claim that she wishes to file here is similar to the Article 78. This claim asks for reinstatement and damages that include lost wages and benefits and damages for pain and suffering.

the Commissioner he was convinced that "a gross miscarriage of justice had occurred and that it warrants your intervention." Mr. Baumgarten then stated that a number of reasons exist why he had reached the conclusion that the termination of Ms. Acosta from her job as an Urban Park Ranger was "unjustified and improper". However, he did not really specify what they are. He then gave some of Ms. Acosta's professional and personal history. He ended the letter with the following:

> We ask that you look into this matter at your earliest convenience and that you exercise your power as Commissioner to reinstate her to her position. Thank you for your assistance.

On September 8, 2010, Ezra Pincus-Roth responded to Mr. Baumgarten's letter on behalf of the Commissioner. In a brief response he states:

> We appreciate your reaching out to us, and your concerns have been referred to the Parks Legal Division for further investigation. If you have any questions, please contact General Counsel Alessandro G. Olivieri at 212-360-1314. Thank you.

Mr. Baumgarten, in his affirmation in support of the Petition (¶5), then says that he called the legal division one or more times with respect to the investigation and provided needed information. He fails to specify what that was. However, he says here that "At all times, it appeared reasonable to forbear, and await the completion of their investigation, and results."

Then on October 3, 2010, Mr. Baumgarten wrote another letter, this time to Mr. Olivieri. In it, he enclosed Mr. Pincus-Roth's September 8 letter to him. There he said, "We have heard nothing further and would appreciate some indication if this matter can be resolved without litigation" and "your attention will be appreciated." But he never heard

anything and, as stated earlier, he timely, by a few days, commenced an Article 78 proceeding on November 5, 2010.

In further support of this petition, Ms. Acosta submitted a five-plus page affidavit giving a comprehensive history of her work with the Department. He included certain highlights of it, which included reporting two PEP officers smoking marijuana on the job, which was received by a Captain Kenneth Brown with abuse toward Ms. Acosta, and her participation in the rescue of a woman, Ms. Lisa Sousle, who had fallen into the Hudson River and had screamed for help. The petitioner had responded to the cry for help.

The petition argues that, based on counsel's notification to the Department of the improper termination, the Department had early notice. This was particularly so since the response indicated that the Department would investigate to ascertain the facts leading to the termination. Therefore, it is urged that the excuse for not timely filing the notice of claim was a good faith reliance on the Parks Commissioner duty to inquire and to act. Ms. Acosta refrained from beginning a lawsuit based on that reliance.

But the Department opposes. Their counsel argues that petitioner has shown no reasonable excuse for not filing a timely notice within 90 days of the termination and that her proffered excuse is "neither satisfactory nor reasonable." (¶10).

The argument is also made that respondents did not have actual knowledge of the essential facts constituting the claim. Here counsel cites to a number of cases, but he does not attach any affidavits from Department employees to corroborate this allegation.

Finally, counsel argues that petitioner has failed to demonstrate that the Department has not been prejudiced. But here again, no factual support for this argument is provided. For example in ¶21, opposing attorney says:

> Respondents do not have actual knowledge of petitioner's claims and certainly did not have actual knowledge during the ninety-day period in which petitioner was required to file her Notice of Claim.

But the basis for this allegation is not given.

In reply, petitioner's counsel challenges all points argued by respondent. He insists that the Department and the City had full knowledge of the facts and circumstances leading to Ms. Acosta's termination from an extensive personnel file going back nine years, by his own letters and calls, and from three lengthy statements petitioner tried to give her supervisors Captain Falcon and Inspector Brown (Exhibit B) which responded in detail to the charges and specifications made against her leading up to her termination.

Counsel also points out the obvious but significant omission by the Department of any affidavits from Parks Department employees supporting its claim of lack of knowledge. In this regard, there is not even a statement that any of the employee/actors in this controversy are no longer with the Department. In contrast, her counsel urges that Acosta's sworn petition avers specific allegations of sexual harassment and a hostile work environment which she says were reported to the Parks Department.

Discussion

In determining whether a court is to exercise its discretion in approving an application for leave to serve a late notice of claim pursuant to General Municipal Law §50-e(5), the court must consider three elements: the reasonableness of the excuse offered for the delay in timely filing; whether the municipality had knowledge of the essential facts constituting the claim; and whether the municipality was prejudiced by the petitioner's failure to comply with the statutory deadline. As counsel for the respondent argued, the

burden is on the petitioner to prove all three. *Matter of Lauray*, 62 AD3d 467 (1st Dep't 2009). I find here that Ms. Acosta has satisfied her burden.

As to the reasonableness of the excuse, it is understandable that petitioner and her attorney wished to avoid the unpleasantness and cost of litigation in a suit against the Department. That fact was timely expressed by her counsel in his communications with the Department. Even after filing her Article 78 within the mandated four months, she still waited to begin a suit for damages hoping the matter could be resolved. But after the adversarial stance taken by the Department in the Article 78 petition, it became apparent that a prompt resolution would not be forthcoming.

As to the knowledge by the Department, the September letter from Pincus-Roth, Assistant to the Deputy Commissioner, told Mr. Baumgarten that his concerns had been referred to the Legal Division "for further investigation". I would like to think that an investigation ferreting out the facts then proceeded. If problems arose while conducting an investigation, certainly Mr. Baumgarten could have been contacted to supply whatever information was needed. He even called to offer help.

Further, as argued by counsel, the Department had Ms. Acosta's complete personnel file. It is certainly possible that this file contained a record of all the events leading up first to the Department's decision to extend her probation for six months and then to its decision to terminate her. Also, Ms. Acosta states that she contested certain allegations and made complaints. If the Department lacked knowledge of the facts or her claims, all they had to do was look at her file, accept the detailed letters she offered to her supervisors, or ask her or her counsel for specifics. None of these things were unreasonable for the Department to have done.

Which leads to prejudice. It is hard under these circumstances to see any prejudice here. While it is petitioner's burden to show the lack of prejudice, respondent helps her in that task by failing to allege that any principal employee had left or that such person has no knowledge or recollection of the relevant events. After all here, we are talking about a matter of months, not years.

Accordingly, it is hereby

ADJUDGED that the petition for leave to serve a late notice of claim is granted and the notice is deemed served in the form attached to Exhibit 10 of the petition upon the service on respondent's counsel of a copy of this decision with notice of entry.

Dated: August 12, 2011

AUG 12 2011

J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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