Matter of Bonaguro v City of New York
2013 NY Slip Op 33826(U)
October 21, 2013
Supreme Court, Kings County
Docket Number: 17160/12
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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In the Matter of the Application of
JOHN BONAGURO,

Petitioner, Decision and order

- against - Index No. 17160/12

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND THE NEW YORK CITY DEPARTMENT OF SANITATION,

Respondents, October 21, 2013

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PRESENT: HON. LEON RUCHELSMAN

The petitioner moves pursuant to General Municipal Law section §50-e seeking to serve a late notice of claim nun pro tunc. The respondents oppose the motion. Papers were submitted by the parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

This is a lawsuit which arises following an accident that occurred on February 14, 2012 when the petitioner was working at a construction project at the Creek Wastewater Treatment Plant in Kings COunty. As a result of the accident the petitioner sustained serious injuries. The motion seeking to file a late notice of claim has now been filed. Petitioner argues that the respondents had actual knowledge of the accident and cannot demonstrate any prejudice. The respondent's counter the excuses presented are insufficient and in any event do not warrant the granting of the request at this late juncture.

Conclusions of Law

When claims against certain public corporations arise, a plaintiff is required to provide a timely notice of claim to that corporation (see, GML §50-e). Aside from wrongful death actions, the notice of claim must be served upon the public corporation within ninety days of the date of the alleged incident (see, GML §50-e (1)(a)). It is well settled that the court maintains discretion to grant leave to serve a late notice of claim but in granting said leave the court should consider certain factors (see, GML §50-e (5)). Thus, plaintiff should demonstrate that the entity to be sued should have generally received actual knowledge of the lawsuit within ninety days or shortly thereafter and that the delay would not substantially prejudice the entity in defending the merits of the lawsuit (Bovich v. East Meadow Public Library, 16 AD3d 11, 789 NYS2d 511 [2d Dept., 2005]).

The first issue the court should consider when deciding to allow a late notice are the circumstances surrounding the failure to file a timely notice. In this case, the petitioner did not secure legal counsel until after the period specified in GML §50-e(5) had already passed. Even if that is deemed unreasonable, that is not the determinative factor. It is true that where petitioner has failed to present a reasonable excuse for the delay in filing a notice of claim, that factor should not, in and of itself, prove fatal to the request (Sanchez v. Country of Westchester, 146 AD2d

620, 536 NYS2d 529 [2d Dept., 1989]). Therefore, if the circumstances surrounding the case would persuade the court to allow a late filing then the absence of a reasonable excuse will be excused.

In the case at bar, there really is no dispute that the respondents had actual notice of the claim. Specifically, the accident was witnessed by a co-worker and the petitioner sought medical attention at the respondent's facility at the construction site and that a medical claim was made to the respondent or a co-defendant. Courts have established that "the filing of an accident report with the employee's agency or department imported actual knowledge to the municipality which, in conjunction with other circumstances present, warranted the granting of leave" (Ceselli v. City of New York, 105 AD2d 251, 483 NYS2d 401 [2d Dept., 1984]; see also, Lucas v. New York, 91 AD2d 637, 456 NYS2d 816 [2d Dept., 1982]). Likewise, the filing of a medical claim provides sufficient requisite knowledge.

The final prong in the test is whether there will be substantial prejudice to the respondent in defending the merits of the lawsuit if the court allows this late notice. In this case there will be no prejudice to the respondent if this petition is granted. The respondent continues to have an opportunity to readily investigate the area around where the accident allegedly took place. Indeed, other than vague, general assertions, there is

nothing concrete establishing any prejudice. For example, there has been nothing introduced that petitioner could not properly investigate the area where plaintiff was injured since conditions may have since changed (Cattell v. Town of Brookhaven, 21 AD3d 896, 800 NYS2d 603 [2d Dept., 2005]) or any other substantive offer.

Therefore, based on the foregoing the motion seeking to serve a late notice of claim is granted.

So ordered.

ENTER:

DATED: October 21, 2013
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC