Matter of New Jersey Mfrs. Ins. co. v City of New York
2013 NY Slip Op 32487(U)
October 7, 2013
Supreme Court, New York County
Docket Number: 154174/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT *Justice* PART 5

Index Number : 154174/2013
NEW JERSEY MANUFACTURERS
vs
CITY OF NEW YORK
Sequence Number : 001
LEAVE SERVE LATE NOT. OF CLAIM GML 50-F

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10-7-13
OCT 07 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

IN THE MATTER OF THE APPLICATION OF
NEW JERSEY MANUFACTURERS INSURANCE
CO. A/S/O RONALD CARTER, FOR LEAVE TO

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

----------X

DECISION/ORDER
Index No. 154174/2013
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED	1-2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	
REPLYING AFFIDAVITS	4
EXHIBITS	
OTHER (X-Motion)	3

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner moves for an Order pursuant to General Municipal Law§ 50-e(5), granting it leave to file a late Notice of Claim *nunc pro tunc*. The City of New York ("the City"), cross-moves pursuant to CPLR§3211(a)(7), seeking an Order dismissing the instant action.

After a review of the papers presented, all relevant statutes and case law, the Court grants the motion and denies the cross motion.

Factual and procedural background:

This is an action for property damage which occurred on February 4, 2012, as a result of a

two vehicle collision. Petitioner alleges that at that time, its insured's vehicle was traveling eastbound on the Belt Parkway, between Exit 11 and Exit 13, in Brooklyn, New York, when it was struck in the rear by a vehicle being operated by City employee, Praimaran Boodram. On that same day, Boodram filled out a police report. (Exh. C). Thereafter, on May 24, 2012, petitioner retained the firm of Molod, Spitz and DeSantis, P.C., after the expiration of the 90 day limitation period. A Summons and Complaint was filed on May 3, 2013.

Positions of the parties:

Petitioner asserts that while its Notice of Claim was not filed within 90 days pursuant to General Municipal Law §50-e(1)(a), it is still within the one year 90 day statute of limitations pursuant to GML§ 50-e(5). It argues that the City has suffered no prejudice as this matter does not involve a transitory condition and that the City has been afforded ample opportunity to investigate the claim in that a police report concerning the accident event was prepared at the scene with the assistance of its own employee. Petitioner also argues that its delay in filing its Notice of Claim was due to "a good faith, inadvertent mathematical error on the part of Petitioner," in that the firm of Molod, Spitz, and DeSantis, P.C. was retained by petitioner after the expiration of the 90 day period. (Petition, ¶ 11). Petitioner further argues that the filing of an accident report combined with the failure of a municipal defendant to demonstrate prejudice may amount to an imputation of actual knowledge to the municipality.

The City argues that it is entitled to dismissal of petitioner's complaint because petitioner failed to comply with the clear, unequivocal requirement promulgated by GML§ 50-e(1)(a), which provides in pertinent part that:

> In 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...

The City also argues that despite the fact that the Court has discretion to grant leave to serve a late notice of claim, it may not do so after the expiration of the statute of limitations. The City argues that since the underlying accident occurred on February 4, 2012, petitioner had until May 4, 2013 to seek leave to serve a late notice of claim. However, it did so on May 6, 2013, two days after the statute of limitations expired. The City also argues that petitioner's claim of law office failure is not considered a reasonable excuse for not timely serving a notice of claim, and also that petitioner has failed to demonstrate that the City had acquired actual knowledge of the facts of the claim. The City further argues that petitioner has not sufficiently demonstrated that the City will not be prejudiced by its delay.

Conclusions of law:

A court in its discretion may extend the time under GML § 50-e to serve a Notice of Claim. In exercising its discretion, the court must consider whether the movant has demonstrated a reasonable excuse for its failure to file a timely Notice of Claim; whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days from its accrual or a reasonable time thereafter; and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (see *Bazile v. City of New York*, 94 A.D.3d 929, 929-930 [2d Dept. 2012]; *Matter of Henriques v. City of New York*, 22 A.D.3d 847, 848 [2d Dept. 2005]; *Plaza v. New York Health & Hosps. Corp., Jacobi Med. Ctr.*, 97 A.D.3d 466 [1st Dept. 2012], *affd* 21 N.Y.3d 983 [2013]; *Seif v. City of New York*, 218 A.D.2d 595 [1st Dept. 1995]).

The presence or absence of any one factor is not determinative, and the absence of a reasonable excuse for the delay is not necessarily fatal (*Chattergoon v. New York City Housing Auth.*, 197 A.D.2d 397 [1st Dept. 1993]; *Nardi v. County of Nassau*, 18 A.D.3d 520 [2d Dept. 2005]; *Velazquez v. City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 A.D.3d 442 [1st Dept. 2010], *lv denied* 15 N.Y.3d 711 [2010], quoting *Matter of Dubowy v. City of New York*, 305 A.D.2d 320 [1st Dept. 2003]; see also *Plaza v. City of New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 A.D.3d at 468; *Schiffman v. City of New York*, 19 A.D.3d 206, 208 [1st Dept. 2005]).

A Notice of Claim is a statutory device that creates a condition precedent to the right to bring an action (see GML§ 50-e (3); § 50- i). Said Notice must be served "within 90 days after the claim arises" (GML§50-e(1)(a)). This statutory precondition serves exclusively "to enable municipalities to pass upon the merits of a claim before the initiation of litigation and thereby forestall unnecessary lawsuits" (*Alford v. City of New York*, 115 A.D.2d 420, 421 [1st Dept. 1985], *affd* 67 N.Y.2d 1019 [1986]). GML§ 50-(3) (as distinguished from the requirements for permission to serve a late claim pursuant to §50-e(5), (6) and (7), is strictly construed (see *Kougianos v. Nassau County Depart. of Public Works*, 31 Misc.3d 1206(A) (2011 N.Y. Slip Op. 50521(U) (Sup. Ct., NY County 2000); *Varsity Tr. v. Board of Educ. of City of New York*, 5 N.Y.3d 532 [2005]).

Where a notice of claim has not been served within the 90-day period specified in GML§ 50-e (1) of the General Municipal Law, an individual possessing a potential tort claim against a public corporation may also apply to the court pursuant to GML§50-e (5), for an extension of time within which to serve notice upon the respondent, and said application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued (*Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 258 [1982];

Pierson v. City of New York, 56 N.Y.2d 951, 954 [1982]).

In the case at bar, the Court agrees with petitioner that since the one year and 90 day expiration period expired on May 5, 2013, a Sunday, the time it had to file its petition/notice was automatically extended to the next available business day which was Monday, May 6, 3013 (see General Construction Law§ 25[a]). Therefore, it is deemed timely.

However, it is petitioner's burden to affirmatively demonstrate that the City did not suffer any substantial prejudice by the failure to file a timely Notice of Claim (see *Jenkins v. New York City Housing Auth.*, 29 A.D.3d 319[1st Dept. 2006]; *Alexander v. City of New York*, 2 A.D.3d 332 [1st Dept. 2003]). In consideration of this, the Court rejects petitioner's argument that the filing of an accident report provided adequate notice to the City. It is it well settled that accident reports are insufficient to satisfy the knowledge requirement of the statute. Indeed, "[t]o adopt plaintiff's position that such circumstances gave defendant timely actual notice of the facts constituting his claim would be to substitute police reports for notices of claim in every instance, mandate that defendant investigate every possible cause of action that might be suggested in an accident report [and] disregard the prejudice caused by the lost opportunity to conduct a prompt investigation...." (*Olivera v. City of New York*, 270 A.D.2d 5 [1st Dept. 2000]; see also *Walker v. NYC Tr. Auth.*, 266 A.D.2d 54 [1st Dept. 1999]; *Kougianos v. Nassau County Dept. of Public Works*, 31 Misc.3d 1206(A), 2011 N.Y. Slip Op. 50521(U)(Sup. Ct. Nassau County 2011); *Matter of Thompson v. City of New York*, 95 A.D.3d 1024 [2d Dept. 2012]).

However, despite the lack of merit of this particular argument, the Court still finds that the City was not irreparably prejudiced by the delay. In her affidavit annexed to the instant Notice of Petition as Exhibit E, Jane E. Rich, employed by petitioner in the capacity of Claims Manager, states

that petitioner and the City made attempts to settle the claim. When said efforts proved fruitless, the claim was referred to Molod, Spitz & DeSantis, P.C., who immediately discovered that the time to file a Notice of Claim had expired. Ms. Rich refers to this as "an omission [which] was wholly unintentional and inadvertent." *Id.* ¶ 9. The Court deems this as a reasonable excuse and is also mindful that since this was not an accident involving a defect in a sidewalk or roadway, or some other transitory condition, the City is not prejudiced by the delay. As far as interviewing witness' are concerned, the City really only has petitioner's insured and the City's employee to interview and/or investigate. Moreover, as this is a rear end collision, the Court is not convinced that there is really very much to investigate.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the instant notice of petition for leave to file a late Notice of Claim *nunc pro tunc* is granted; and it is further

ORDERED that respondent the City's cross motion to dismiss the action pursuant to CPLR§ 3211(a)(7) is denied; and it is further

ORDERED that the petitioner shall serve a copy of this order on respondent and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 7, 2013

ENTER:

OCT 07 2013

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT