Smith v City of New York
2014 NY Slip Op 33401(U)
December 11, 2014
Supreme Court, Bronx County
Docket Number: 20671/14
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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CHRIS SMITH,

Plaintiff(s),

DECISION AND ORDER

Index No: 20671/14

- against -

THE CITY OF NEW YORK AND THE NEW YORK CITY HOUSING AUTHORITY,

Defendant(s).
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In this action for alleged personal injuries precipitated by a dangerous condition existing on the public sidewalk abutting real property, plaintiff moves seeking an order granting renewal of this Court's order dated June 23, 2014, which denied his application for (1) leave to file a late notice of claim; (2) deeming the untimely notice of claim filed by him timely *nunc pro tunc*; and (3) and granting him leave to amend his complaint to reflect that a timely notice of claim was filed. Plaintiff avers that renewal is warranted insofar as he only became aware that he had conveyed the facts constituting his claim to employees of defendant THE NEW YORK CITY HOUSING AUTHORITY (NYCHA) after he made the prior motion and that, as a result, he failed to establish an element essential to the relief he then sought. Plaintiff also seeks reargument of this Court's prior order averring that in denying his prior application solely on grounds that he failed to offer a reasonable excuse for his failure to timely file a notice of claim, the Court misapplied

controlling law. NYCHA opposes the instant motion averring that insofar as the newly proffered evidence was available to plaintiff when he made his prior motion, renewal is unwarranted. NYCHA further contends that in denying plaintiff's prior motion solely on grounds that plaintiff failed to proffer a reasonable excuse for his failure to timely file his notice fo claim, the Court correctly applied controlling law.

For the reasons that follow hereinafter, plaintiff's motion to renew is hereby granted and his application to reargue is denied.

The instant action is for alleged personal injuries. Plaintiff's notice of claim, which he served upon defendants on December 27, 2013, alleges that on August 22, 2013, he tripped and fell on the pathway/crosswalk located at 365 East 183rd Street, Bronx, NY. Plaintiff further alleges that he was caused to trip and fall by reason of a metal pipe-like fixture existing at the aforementioned location, which pipe constituted a hazard. Plaintiff contends that defendants who owned and maintained the location herein were negligent in allowing the pipe to exist and that negligence caused him to sustain injury.

On June 23, 2014, this Court denied plaintiff's application seeking an order, *inter alia*, granting him leave to interpose a late notice of claim because plaintiff failed to proffer a reasonable excuse for his failure to file his notice of claim

within the time period prescribed by law. Specifically, the court noted that

> [p]laintiff, by counsel, avers - under a heading titled 'A Slight Delay in Pursuing a Claim Was Reasonable Due to Plaintiff's Physical Disabilities' - that the delay in timely filing a notice of claim was due to plaintiff's pursuit of extensive treatment. However, plaintiff offers nothing more on the issue of his disability, how it precipitated his incapacity, and how this incapacity impeded his ability to file a timely notice of claim. As discussed above, while physical incapacity is a cognizable excuse for failure to file a timely notice of claim, any physical incapacity must medically corroborated with medical evidence.

Thus, the Court, relying on precedent requiring denial of applications seeking leave to file a belated notice of claim when the excuse proffered for such failure was a medical disability, but which disability, the proponent of such leave failed to support, denied plaintiff's motion (*Casale v City of New York*, 95 AD3d 744, 744 [1st Dept 2012] ["Petitioners failed to offer a reasonable excuse for not serving a timely notice of claim. Indeed, petitioners failed to submit any medical evidence supporting their assertion that the injured petitioner's physical condition prevented them from timely serving a notice of claim."]; *Mandia v County of Westchester*, 162 AD2d 217, 218 [1st Dept 1990] ["Petitioners failed to submit a medical affidavit by a physician or otherwise to substantiate their claim that the delay in service

was due to physical incapacity."]). To be sure, on the prior motion plaintiff did not provide an affidavit detailing the nature of his disability or why the same prevented him from timely filing a notice of claim. Based on the foregoing, the Court then dismissed this action against all defendants, finding that absent the filing of timely notice of claim or judicial leave to file the same, this action was afflicted by an incurable jurisdictional defect.

Plaintiff's motion to renew is hereby granted insofar as the evidence submitted on renewal, namely an affidavit, establishes that NYCHA had actual notice of the facts underlying plaintiff's claim within the ninety days following his accident and that plaintiff's failure to timely file his notice of claim was due to medical incapacity.

It is well settled that a motion to renew

> shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion(CPLR § 2221[e][2], [3]).

Thus,

> [a]n application for leave to renew must be based upon additional material facts

> which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the Court. Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application

(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; *see also Healthworld Corporation v. Gottlieb*, 12 AD3d 278, 279 [1st Dept 2004]; *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Linden v Moskowitz*, 294 AD2d 114, 116 [1st Dept 2002]; *Basset v Bando Sangsa Co.*, 103 AD2d 728, 728 [1st Dept. 1984]. Renewal is a remedy to be used sparingly and granted only when there exists a valid excuse for failing to submit the newly proffered facts on the original application (*Beiny v. Wynyard*, 132 AD2d 190, 210 [1st Dept 1987]). In fact, renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Burgos v City of New York*, 294 AD2d 177, 178 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]), and "the remedy [is unavailable] where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Foley* at 568).

Notwithstanding the foregoing, courts have nevertheless carved an exception to the general rule and a motions to renew will be granted even when all requirements for renewal are not met (*Bank One v Mui*, 38 AD3d 809, 811 [2d Dept 2007], *abrogated on other grounds by* 95 A.D.3d 1147 [2d Dept 2012]; *Strong v Brookhaven Memorial Hospital Medical Center*, 240 AD2d 726, 726 [2d Dept 1997]). As such, motions to renew can be granted even when the newly offered evidence was in fact known and available to the movant but never provided to the Court (*Tishman Construction Corporation of New York v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]; *Trinidad v Lantigua*, 2 AD3d 163, 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *U.S. Reinsurance Corporation v Humphreys*, 205 AD2d 187, 192 [1st Dept 1994]; *J.D. Structures, Inc. v Waldbum*, 282 AD2d 434, 436 [2d Dept 2001]; *Sorto v South Nasaau Community Hospital*, 273 AD2d 373, 373-374 [2d Dept 2000]; *Cronwall Equities v International Links Development Corp.*, 255 AD2d 354, 355 [2d Dept 1998]; *Goyzueta v Urban Health Plan, Inc.*, 256 AD2d 307, 307 [2d Dept 1998]; *Liberty Mutual Insurance Company v Allstate Insurance Company*, 237 AD2d 260, 262 [2d Dept 1997]). Renewal with new evidence previously known and available to movant - a departure from precedential case law and the statute - is, thus, warranted if the interest of justice and substantial substantive fairness so dictate (*Trinidad* at 163; *Mejia* at 871; *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996];

Scott v Brickhouse, 251 AD2d 397, 397 [2d Dept 1998]; *Strong* at 726; *Goyzueta* at 307). Stated differently, a motion to renew can be granted, in the exercise of the court's discretion, even when the new evidence proffered was readily available to the moving party, such that all requirements necessary for renewal have not been met - including the failure to proffer an excuse for failing to provide previously available and known evidence with the previous motion - if considering the new evidence changes the outcome of the Court's prior decision (*Trinidad* at 163; *J.D. Structures, Inc.* at 436).

In *J.D. Structures, Inc.*, the court granted a renewal of its prior when renewal after considering previously available evidence, but which while known to the movant, it did not submit on the original motion (*id.* at 435-436). The court had initially denied plaintiff's motion seeking summary judgment on grounds of an agreement according said relief because plaintiff failed to include evidence relative to the debt owed, such evidence dispositive on the motion (*id*). On renewal, plaintiff tendered evidence of the debt owed averring that the failure to provide the same on the prior motion was the mistaken belief that the motion would be decided favorably without such evidence (*id.*). The court granted renewal despite plaintiff's failure to submit previously available evidence, which was known to plaintiff on grounds that an excuse had been proffered for the failure to submit the same and because

the new evidence, warranted judgment in plaintiff's favor (*id.*). Simiarly, in *Trinidad*, the court granted renewal when the same was premised upon the submission of a previously known and available expert affidavit despite the fact that no excuse was proffered for the failure to previously submit the same (*id.* at 163).

Here, on renewal, plaintiff submits an affidavit wherein he asserts that August 24, 2013, two days after he allegedly fell in front NYCHA's premises, he spoke to a women, which he suspected was employed by NYCHA. Plaintiff conveyed the particulars of his accident, showing this woman the pipe upon which he fell. In September 2013, plaintiff spoke to a man, who he suspected was also employed by NYCHA, to whom he also conveyed the particulars of his accident; showing this man the pipe upon which he fell. It was not until April 2014, that plaintiff confirmed that the people to whom he had spoken about his accident were in fact employed by NYCHA. Plaintiff came to learn that the man was George Perez and the woman was Denita Zellner. Plaintiff also states that after his accident and as a result of his injuries, he was prescribed pain medication, which because they caused him to sleep excessively, partially incapacitated him; preventing him from seeking legal counsel until December 16, 2013.

Here, it is true, as argued by NYCHA, that plaintiff could have submitted his affidavit on the prior motion, which affidavit

establishes both actual notice to NYCHA of the facts constituting the claim within ninety days of plaintiff's accident as well as plaintiff's medical incapacity as the reason for his failure to timely file a notice of claim. However, as noted above, here, where the affidavit warrants reversal of a portion of this Court's prior order, even if the information sought was known and available to the plaintiff on the prior motion, the interests of justice and substantial fairness nevertheless require that renewal be granted (*Trinidad* at 163; *Mejia* at 871; *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996]; *Scott v Brickhouse*, 251 AD2d 397, 397 [2d Dept 1998]; *Strong* at 726; *Goyzueta* at 307). Similarly, while generally on renewal, there ought to be a reasonable excuse for the failure to provide dispositive evidence on a prior motion, here, even if as argued by NYCHA, plaintiff's reason for failing to proffer his affidavit on the prior motion is unreasonable, the same is no bar to renewal if, where as here, the interests of justice so warrant (*Trinidad* at 163 ["Under the particular circumstances presented, the affidavit of plaintiff's expert, which plaintiff's prior counsel inexplicably failed to submit, was properly considered by the court on renewal."]).

Because leave to file a belated notice of claim will be granted if (1) the claimant has a reasonable excuse for the failure to serve a timely notice of claim; (2) the municipality acquired actual knowledge of the essential facts constituting the claim

within 90 days after it arose, or a reasonable time thereafter; and (3) the delay in filing would not substantially prejudice the municipality maintaining a defense on the merits (*Jusino v New York City Housing Authority* 255 AD2d 41, 47 [1st Dept 1999]; *Gerzel v City of New York*, 117 AD2d 549, 550 [1st Dept 1986]; *Morrison v New York City Health and Hospitals Corp.*, 244 AD2d 487, 487 [2d Dept 1997]), upon renewal plaintiff's application must be granted. As already noted above, his excuse for failure to timely file a noticed of claim is medical in nature and aptly supported by his affidavit (*Casale* at 744; *Mandia* at 218).

Moreover, whether the municipal defendant received knowledge of the facts constituting the claim within 90 day of its occurrence or within a reasonable time thereafter means "whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter" (GML § 50-e [5]). Thus, actual knowledge means that the defendant acquired knowledge of the essential facts forming the basis of the negligence claim within 90 days of its occurrence, not simply knowledge that an accident occurred (*Kim v City of New York*, 256 AD2d 83, 84 [1st Dept 1998] [Court held that knowledge that petitioner was injured when instructed by a teacher to move a large piece of plywood, was not tantamount to notice of petitioner's claim that respondents "were negligent in not

providing petitioner with the mechanical means to move the plywood and otherwise in their supervision of petitioner's activities."]; *Chattergoon v New York City Housing Auth.*, 161 AD2d 141, 142 [1st Dept 1990] ["What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the claim (internal quotation marks omitted).]; *Bullard* at 450-451 [1st Dept 1986]). Here, plaintiff establishes that approximately two days after his accident and then again 45 days thereafter, he gave specific details about the accident and the defect alleged to two of NYCHA's employees. Thus, plaintiff establishes actual notice to NYCHA within 90 days of the accident alleged.

Lastly, contrary to NYCHA's assertion, plaintiff's affidavit establishes the absence of any prejudice to NYCHA by the belated filing of plaintiff's notice of claim. With regard to prejudice, the primary purpose of the notice of claim requirement is to permit the municipality to conduct a prompt investigation of the facts and circumstances out of which a claim arose while information is still fresh and readily available (*O'Brien* at 358; *Adkins v City of New York*, 43 NY2d 346, 350 [1977]), a delay is often prejudicial insofar as the passage of time often "prevent[s] an accurate reconstruction of the circumstances existing at the time the accident occurred." (*Vitale v City of New York*, 205 AD2d 636, 636 [2d Dept 1994] [internal quotation marks omitted]). Similarly, a delay can impact a municipal defendant's ability to "locate and

examine witnesses while their memories of the facts were still fresh." (*Gilliam v City of New York*, 250 AD2d 680, 681 [2d Dept 1998]; *see also* Kim at 84). Thus, the proponent of an application to file a belated notice of claim must establish that the defendant has not been prejudiced by the delay in filing a timely notice of claim (*Delgado v City of New York*, 39 AD3d 387, 388 [1st Dept 2007]). Here, where it is alleged that NYCHA had notice of the accident and the non-transitory defect alleged a mere two days after plaintiff's alleged accident the absence of prejudice by plaintiff's belated filing is self-evident.

Notably, while NYCHA submits affidavits from both of the employees to whom plaintiff alleges to have spoken about his accident and both of whom, *inter alia*, deny any such conversation, such evidence does not warrant denial of the instant motion. At best, such denials strike at the heart of the merit of plaintiff's claims. While true, that leave to file a late notice of claim ought to be denied when the claims are patently mertiless (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]), it is equally true, unless it is clear that the claims made are meritless, "a court entertaining an application to serve a late notice of claim will not examine the merits" of the claims made (*Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp.*, 272 AD2d 112, 113-114 [1st Dept 2000]). Here, where the denials by NYCHA's employees are indeed troubling, it cannot be said that plaintiff's

claims patently meritless.

Based on the foregoing, plaintiff's application for reargument is denied as moot. Upon renewal, plaintiff's application seeking leave to serve a late notice of claim upon NYCHA is granted, the notice of claim already served is deemed timely, *nunc pro tunc*, the same is deemed timely served and accepted, and the complaint is deemed amended to reflect compliance with GML § 50-e and PHL § 157. Plaintiff's motion, to the extent it sought identical relief against defendant THE CITY OF NEW YORK (the City) is denied insofar as it is clear that as to the City, plaintiff failed to establish entitlement to such relief. This is particularly borne out by plaintiff and NYCHA's affidavits establishing that any actual notice of the facts constituting this claim within 90 days of the accident's occurrence was given to NYCHA and not the City. It is hereby

ORDERED that plaintiff's Notice of Claim, dated December 27, 2013 be deemed timely filed and received by NYCHA, *nunc pro tunc*, plaintiff's complaint be deemed amended to reflect compliance with GML § 50-e and PHL § 157, and that same be deemed served, and accepted. It is further

ORDERED that the Clerk of the Court restore this action to the Court's pre-trial calendar as against NYCHA only. It is further

ORDERED that this action be transferred to Part 17, the Public Authorities Part. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : December 11, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ