Watkins v City of New York
2016 NY Slip Op 31669(U)
August 25, 2016
Supreme Court, Kings County
Docket Number: 504576/2016
Judge: Lara J. Genovesi

At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 25th day of August, 2016.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

----------x

DIANNE WATKINS,

Petitioner,

Index No.: 504576/2016

DECISION & ORDER

-against-

CITY OF NEW YORK,

Respondent.

----------x

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3

Introduction

Petitioner Dianne Watkins moves by order to show cause, sequence number one, dated March 28, 2016, pursuant to General Municipal Law (GML) section 50-e for an order (1) granting petitioner leave to file the late notice of claim and have service deemed timely *nunc pro tunc*; and (2) for such other and further relief as this Court may deem just, proper and equitable. Respondent the City of New York opposes this application.

Background

On August 30, 2015, petitioner allegedly tripped and fell on a broken, uneven and unleveled sidewalk in front of 885 Gates Avenue also known as 732 Quincy Street in Brooklyn, New York. Petitioner contends she sustained a "fracture of the anterior aspect of the patellar facet and horizontal undersurface tear of the posterior horn of the meniscus" (*see* Order to Show Cause, Petition of Dianne Watkins at p 1).

Petitioner conducted a search for the last owner of the property abutting the sidewalk where she tripped and fell. The search revealed that the owner is the New York City Housing Authority (NYCHA). On September 8, 2015, nine days after the accident occurred, petitioner submitted a FOIL request to the New York City Department of Transportation seeking multiple records for the subject area. On September 10, 2015, 11 days after the incident, petitioner filed a notice of claim against NYCHA. On January 13, 2016 (136 days after the incident and 125 days after petitioner filed the notice of claim) petitioner's 50-h hearing was held with NYCHA. Petitioner commenced an action against NYCHA on March 1, 2016, (184 days after the incident and 173 days after petitioner filed the notice of claim).[1] Thereafter, on March 14, 2016, counsel for NYCHA advised petitioner that NYCHA has a contract with the City of New York wherein the City is required to maintain the sidewalk. This information was disclosed by NYCHA to the petitioner 197 days after the incident; 186 days after petitioner filed the notice of claim; and 107 days after the notice of claim was due.

[1] Watkins v. NYCHA, index number 2184/2016, New York State Supreme Court, Kings County.

Petitioner contends that the response to the FOIL request made on September 8, 2015, although dated March 2, 2016, was not received until March 7, 2016. The records indicate that on at least 4 occasions prior to petitioners' incident, 311 received reports of a defect similar to that alleged herein. Further, petitioner contends that the Department of Transportation inspected the location and notified NYCHA of the condition. Specifically, the DOT records note that on March 26, 2014; May 29, 2014; August 24, 2014; and January 2, 2015 "[t]he Department of Transportation inspected the location and notified the property owner of any defective sidewalk conditions. The property owner is responsible for maintaining, repairing, and installing sidewalks adjoining their property according to section 19-152 of the New York City Administrative Code." The records repeatedly indicate that the sidewalk is "City-Owned".

Petitioner commenced this action by electronically filing the petition and order to show cause on March 28, 2016 (211 days after the incident; 200 days after petitioner filed the notice of claim; and 14 days after NYCHA's disclosure of their contract with the City). The efile clerk's comment on March 28, 2016, states that the application was "[a]pproved as to form, not content. Submit a working copy to part 72, with the confirmation notice." The order to show cause was signed on May 12, 2016, by the Hon. Edgar Walker.[2]

The date of the incident was August 30, 2015. The notice of claim was due on November 30, 2015. Petitioner timely filed a notice of claim against NYCHA on

[2] The efile system contains no other comments on the filing. It is unclear whether the delay from the filing on March 28, 2016, to signing on May 12, 2016, was due to petitioner's delay in providing a working copy to the Ex-Parte Office, or merely a general delay in processing.

September 10, 2015. On March 28, 2016, petitioner moved for leave to serve a late notice of claim against the City, 121 days after the 90-day period expired.

Petitioner's Contentions

Petitioner maintains that his reasonable excuse for the delay in filing a timely notice of claim is that NYCHA, the property owner of the land abutting the sidewalk, only disclosed their contractual relationship with the City regarding the maintenance of the sidewalk, on March 14, 2016. Petitioner filed the within application 14 days later. Petitioner further contends that the City had actual knowledge of the broken sidewalk based upon the 311 calls and the multiple DOT inspections conducted as evinced in the response to petitioner's FOIL request. Lastly, petitioner states that the City is not prejudiced in the late filing since the City had actual and constructive notice of the defect.

The City's Contentions

The City contends that petitioner failed to proffer a reasonable excuse for not timely filing her notice of claim. Petitioner's ignorance of her right to sue the City regarding the maintenance of the sidewalk does not justify her failure to do so. Likewise, law office failure is not a reasonable excuse for the delay in timely filing a notice of claim. The City states that "[i]t is clear in the instant case Petitioner simply failed to exercise due diligence in investigating her claim" (Affirmation in Opposition, ¶ 12). The City rejects petitioner's contention that the City acquired actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter. The City avers that petitioner conflates the prior written notice law (NYC Adm. Code §7-201) and the requirement to file a notice of claim (GML §50-e). If in fact

the City was on notice to the defective sidewalk, that does not mean that the City acquired actual notice of the facts constituting the claim herein. Lastly, the City contends that the petitioner failed to rebut the presumption that the City has not been prejudiced by the delay in failing to file a timely notice of claim.

Discussion

GML § 50-e

Service of a notice of claim within 90 days after accrual of the claim is a condition precedent to the commencement of a tort action against the City of New York or a public corporation (*see* GML § 50-e; *see also Cassidy v. Riverhead Cent. Sch. Dist.,* 128 A.D.3d 996, 11 N.Y.S.3d 102 [2 Dept., 2015]; *Chtchannikova v. City of New York*, 138 A.D.3d 908, 30 N.Y.S.3d 233 [2 Dept., 2016]). "The determination to grant leave to serve a late notice of claim lies within the sound discretion of the Supreme Court" (*Barrett v. Vill. Of Wappingers Falls,* 130 A.D.3d 817, 12 N.Y.S.3d 577 [2 Dept., 2015]; *see Wooden v. City of New York,* 136 A.D.3d 932, 25 N.Y.S.3d 333 [2 Dept., 2016]; *Nurena v. Westchester Cnty.,* 120 A.D.3d 781, 992 N.Y.S.2d 86 [2 Dept., 2014]). However, a claimant must petition for leave to serve a late notice of claim, or to deem a notice of claim timely served *nunc pro tunc,* within one (1) year and 90 days from the date which the claim accrues. Otherwise the claim is barred by the statute of limitations (*see* GML § 50-e[5]; *Laroc v. City of New York*, 46 A.D.3d 760, 847 N.Y.S.2d 677 [2 Dept., 2007]).

In determining whether to grant an application for leave to serve a late notice of claim or to deem a late notice of claim timely served *nunc pro tunc*, pursuant to General

Municipal Law § 50–e[5], the court must consider "all relevant facts and circumstances". This generally includes,

> whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits.

(*Rojas v. New York City Health and Hospitals Corp.,* 127 A.D.3d 870, 6 N.Y.S.3d 294 [2 Dept., 2015], citing GML § 50-e[5][a]).

However, pursuant to GML § 50-e(5), "relevant facts and circumstances" also include "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted" (GML § 50-e[5][a]; *see also Kuterman v. City of New York,* 121 A.D.3d 646, 993 N.Y.S.2d 361 [2 Dept., 2014]; *Nurena v. Westchester Cty.,* 120 A.D.3d 781, 992 N.Y.S.2d 86 [2 Dept., 2014]; *Placido v. Cnty. of Orange,* 112 A.D.3d 722, 977 N.Y.S.2d 64 [2 Dept., 2013]; *Gershanow v. Town of Clarkstown,* 88 A.D.3d 879, 931 N.Y.S.2d 131 [2 Dept., 2011]).

In the instant matter, petitioner's time to file a timely notice of claim expired on November 30, 2015. The instant application was brought on March 28, 2016, which is 121 days after the expiration of the statutory time to file a notice of claim. It is not disputed that this application was brought timely, before the statute of limitations expired. At issue is petitioner's application for leave to file a late notice of claim and deem the service timely filed *nunc pro tunc.*

Reasonable Excuse

The Appellate Division, Second Department has consistently held that a petitioner's ignorance of the law does not constitute a reasonable excuse (*see Matter of Lapierre v. City of New York,* 136 A.D.3d 821, 24 N.Y.S.3d 725 [2 Dept., 2016]; *see also Matter of Fernandez v. City of New York,* 131 A.D.3d 532, 15 N.Y.S.3d 16 [2 Dept., 2015]; *Bell v. City of New York,* 100 A.D.3d 990, 954 N.Y.S.2d 229 [2 Dept., 2012]). Similarly, "law office failure does not constitute a reasonable excuse for failing to timely serve a notice of claim [internal citations omitted]" (*King v. New York City Housing Authority*, 274 A.D.2d 482, 711 N.Y.S.2d 33 [2 Dept., 2000]; *see Matter of Morris v. City of New York,* 132 A.D.3d 997, 18 N.Y.S.3d 702 [2 Dept., 2015]; *Peters-Heenpella v. Wynn*, 105 A.D.3d 725, 962 N.Y.S.2d 644 [2 Dept., 2013]).

In the instant case, petitioner timely filed a notice of claim on NYCHA on September 10, 2015. Although petitioner's application for leave to serve a late notice of claim is 121 days beyond the 90-day statutory period, under the circumstance presented herein, petitioner proffers a reasonable explanation as to the delay in seeking leave to file the late notice of claim. Almost immediately after the incident, petitioner retained counsel who performed a search for the property owner where the incident occurred. The results of this search indicated that NYCHA is the owner. Counsel filed a notice of claim a mere ten days after the incident, against the owner of the property - NYCHA. Counsel also made a prompt FOIL request on September 8, 2015. However, petitioner waited 181 days for the response, which was received on March 7, 2016.

Furthermore, although NYCHA proceeded with their 50-h hearing in January 2016, it was not until March 14, 2016, that NYCHA advised petitioner that NYCHA has a contract with the City of New York wherein the City is required to maintain the sidewalk. This was first told to petitioner 186 days after petitioner filed the notice of claim with NYCHA and 107 days after the notice of claim was due. This is not an example of mere law office failure, as the contract is not a publicly accessible record. Furthermore, petitioner filed a motion seeking leave to serve a late notice of claim on the City of New York a mere two weeks after learning of this contract. Accordingly, under these circumstances, given the timely notice of claim served on NYCHA and NYCHA's 186-day delay in disclosing the contract with the City, petitioner had a reasonable excuse for the delay in seeking leave.

Actual Knowledge

In determining whether to extend the time to serve a notice of claim, "[a] factor which is of great importance is whether the respondents acquired timely actual knowledge of the essential facts constituting the claim" within 90 days or a reasonable time thereafter (*Mitchell v. City of New York*, 134 A.D.3d 94, 122 N.Y.S.3d 130 [2 Dept., 2015]; *see* GML § 50-e). When determining whether a public corporation has acquired actual knowledge, the Appellate Division, Second Department considers whether the public corporation received actual knowledge of the essential facts constituting the claim, and not merely general knowledge that a wrong has been committed (*see Stewart v. Westchester Inst. for Human Dev.,* 136 A.D.3d 1014, 25 N.Y.S.3d 656 [2 Dept., 2016],

citing Matter of Devivo v. Town of Carmel, 68 A.D.3d 991, 891 N.Y.S.2d 154 [2 Dept., 2009]).

"In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" (*Stewart v. Westchester Inst. for Human Dev.,* 2016 WL 716904, *supra*, citing *Matter of Felice v. Eastport/South Manor Cent. School Dist.,* 50 A.D.3d 138, 851 N.Y.S.2d 218 [2 Dept., 2008]; *see also Hampson v. Connetquot Cent. Sch. Dist.*, 114 A.D.3d 790, *supra*). "Generally, the phrase 'facts constituting the claim' is understood to mean the facts which would demonstrate a connection between the happening of the accident and any negligence on the part of the public corporation" (*see Romeo v. Long Island Power Authority,* 133 A.D.3d 667, 19 N.Y.S.3d 316 [2 Dept., 2015]; *Placido v. Cnty. of Orange,* 112 A.D.3d 722, *supra*).

"'While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance'" (*Luna v. City of New York*, 139 A.D.3d 818, 31 N.Y.S.3d 180 [2 Dept., 2016], quoting *Iacone v. Town of Hempstead,* 82 A.D.3d 888, 918 N.Y.S.2d 202 [2 Dept., 2011]; *see Rojas v. New York City Health and Hospitals Corp.,* 127 A.D.3d 870, *supra*).

In the instant case, although petitioner timely filed a notice of claim against NYCHA, there is no evidence that the City received actual knowledge of the essential

facts until the instant application was filed 121 days after expiration of the 90-day statutory period. The 311 calls and DOT inspections are insufficient to have provided actual knowledge within 90-days or a reasonable time because they did not evince the essential facts constituting the petitioner's claim.

Although petitioner did not learn of the contract between NYCHA and the City for nearly nine months, and sought leave to file a late notice of claim a mere two weeks later, a delay of 121 days is not a "reasonable time" after expiration of the statutory period (*see Destine v. City of New York,* 111 A.D.3d 629, 974 N.Y.S.2d 123 [2 Dept., 2013] [where the notice of claim served "more than 4 ½ months after the 90-day statutory period had elapsed did not provide the City with actual knowledge of the essential facts constituting the claims within a reasonable time after the expiration of the statutory period"]; *see also Abramovitz v. City of New York,* 99 A.D.3d 1000, 953 N.Y.S.2d 137 [2 Dept., 2012] [where petitioner served a notice of claim on the City of New York, but did not serve the New York City Transit Authority, who therefore, had no actual knowledge of the legal theory on which liability was predicated until service of the application for leave]). Accordingly, petitioner failed to establish that the City had actual knowledge within 90 days or a reasonable time thereafter. However, while actual knowledge is an important factor, "the presence or the absence of any one of the factors is not necessarily determinative" (*Luna v. City of New York*, 139 A.D.3d 818, *supra*).

Substantial Prejudice

The purpose of the notice of claim requirement is to protect public corporations against stale claims and to give them an opportunity to timely and efficiently investigate

tort claims (*see generally Felice v. Eastport/S. Manor Cent. Sch. Dist.*, 50 A.D.3d 138, *supra; see also Peterson v. New York City Dep't of Envtl. Prot.*, 66 A.D.3d 1027, 887 N.Y.S.2d 269 [2 Dept., 2009]). There is a presumption that the delay prejudices the municipality unless proven otherwise. Petitioner has the burden of proof (*see Nurena v. Westchester Cnty.*, 120 A.D.3d 781, *supra; see generally Regan v. City of New York,* 131 A.D.3d 1064, 16 N.Y.S.3d 280 [2 Dept., 2015]; *Fox v. New York City Dep't of Educ.,* 124 A.D.3d 887, *supra*).

In the instant case, although petitioner's application is 121 days late, there is no evidence that the City would be prejudiced. A conclusory assertion that respondent will be unable to investigate the petitioners' claim due to the passage of time is insufficient to overcome the petitioners' showing of a lack of substantial prejudice (*see Regan v. City of New York* 131 A.D.3d 1064, *supra; see also Kellman v. Hauppauge Union Free Sch. Dist.,* 120 A.D.3d 634, 991 N.Y.S.2d 128 [2 Dept., 2014]). The statute's intended purpose is to protect the municipality from stale claims and afford them the opportunity to investigate. The case at bar is not one where the owner of the property had no knowledge of the claim or opportunity to investigate for 121 days. Here, petitioner timely filed a notice of claim against NYCHA. Although petitioner did not learn about the contract between the City and NYCHA for nine months, NYCHA was afforded ample opportunity to investigate the claim. Accordingly, petitioner rebutted the presumption that the City would be substantially prejudiced by the delay.

Excusable Error

Pursuant to GML § 50-e(5)(a), in determining whether to grant leave to serve a late notice of claim, the court may consider other "relevant facts and circumstances" which include "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted". "An error in serving the wrong governmental entity with a notice of claim may be excused if remedied promptly after discovery of the mistake" (*Gershanow v. Town of Clarkstown,* 88 A.D.3d 879, *supra; Ruffino v. City of New York*, 57 A.D.3d 550, 868 N.Y.S.2d 739 [2 Dept., 2008]; *see also McLean v. Valley Stream Union Free Sch. Dist. 30*, 48 A.D.3d 571, 852 N.Y.S.2d 227 [2 Dept., 2008]; *Flynn v. Town of Oyster Bay,* 256 A.D.2d 341, 681 N.Y.S.2d 337 [2 Dept., 1998]).

In the instant case, petitioner did not sue the wrong governmental entity. Petitioner, in her due diligence, learned that NYCHA is the owner of the property, and asserted her claim against NYCHA. However, in this particular case, the contractual relationship between NYCHA and the City of New York obligates the City to maintain the sidewalk in question. Therefore, petitioner may correctly assert a claim against the City directly as well as NYCHA. Although petitioner did not necessarily sue the incorrect governmental entity, because of the existence of the contract, she did make an "error as to the identity of the public corporation against which her claims should be asserted". Under the circumstances presented herein, this error is excusable.

Petitioner promptly and efficiently served a notice of claim on NYCHA, the owner of the sidewalk, on September 10, 2015, which is approximately two weeks after the

incident occurred. Petitioner made a FOIL request on September 8, 2015, which is less than two weeks after the incident occurred. Unfortunately, petitioner did not receive the results of that request until March 7, 2016, approximately six months later. Furthermore, petitioner continued with the action against NYCHA, and appeared for a 50-h hearing on January 13, 2016. NYCHA did not disclose the existence of a contract which requires the City to maintain the NYCHA owned sidewalk until March 14, 2016. The contract is not publically available. There is no other way petitioner could have learned of this contract.

Notwithstanding the delay in processing of the efiled order to show cause, petitioner promptly sought to remedy her error and moved for leave to file a late notice of claim against the City on March 28, 2016, a mere two weeks after learning of the contract. Accordingly, since petitioner promptly remedied the error by seeking leave to file against the City of New York, this error may also be excused (*see Ruffino v. City of New York*, 57 A.D.3d 550, *supra*; *cf. Murray v. Vill. of Malverne*, 118 A.D.3d 798, 987 N.Y.S.2d 229, [2 Dept., 2014]; *Kuterman v. City of New York,* 121 A.D.3d 646, *supra* [where the petitioners' initial delays were excusable, but they failed to proffer a reasonable excuse for the lengthy delays between the discovery of the error and the filing of the petitions seeking leave]; *cf Platt v. New York City Health & Hosps. Corp.,* 105 A.D.3d 1026, 964 N.Y.S.2d 223 [2 Dept., 2013] [where the plaintiff had information as to the ownership of the HHC's vehicle before her time to serve a timely notice of claim expired]).

Conclusion

"The determination of an application for leave to serve and file a late notice of claim is left to the sound discretion of the trial court" (*Wooden v. City of New York,* 136 A.D.3d 932, *supra*; *see Barrett v. Vill. Of Wappingers Falls,* 130 A.D.3d 817, *supra*; *Nurena v. Westchester Cnty.,* 120 A.D.3d 781, *supra*). While actual knowledge is an important factor, "the presence or the absence of any one of the factors is not necessarily determinative" (*Luna v. City of New York*, 139 A.D.3d 818, *supra*).

Here, although the City did not have actual knowledge of the essential facts of the claim within 90-days or a reasonable time thereafter, petitioner made an excusable error in serving the wrong governmental entity, which was promptly rectified. She had a reasonable excuse for the delay and the rebutted the presumption of prejudice. Accordingly, the petitioner's motion for leave to file a late notice of claim is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

To:

Cary Hunter Kaplan, Esq.
Kaplan & Kaplan, Esquires
Attorney for Petitioner
16 Court Street, Suite 2305
Brooklyn, New York 11241

Zachary Carter, Esq.
By: Ryan Joseph Murphy, Esq.
Corporation Counsel for the City of New York
Attorneys for Respondents
350 Jay Street, 8th Floor
Brooklyn, New York 11201