

Matter of Jimenez v City of New York

2017 NY Slip Op 31770(U)

August 2, 2017

Supreme Court, Kings County

Docket Number: 508220/2016

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 2nd day of August 2017.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In the Matter of the Application of YOLANDA
JIMENEZ,

Plaintiff,

Index No. 508220/2016
Cal. No. 23

-against-

THE CITY OF NEW YORK,

DECISION AND ORDER

Defendant.

-----X

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

<u>Papers</u>	<u>Numbered</u>
Notice of Petition & Annexed Affirmation/Affidavits	1-2
Affirmation in Opposition	3

Upon the foregoing cited papers, and after oral argument, the decision and order on plaintiff's petition for leave to serve a late notice of claim and deem the notice of claim served on February 17, 2016, timely nunc pro tunc is as follows:

Petitioner seeks to recover for personal injuries allegedly sustained in a trip and fall on the triangular, paved traffic island/median located in or near the intersection of Lafayette Avenue, Schermerhorn Street, and Flatbush Avenue in Brooklyn on November 18, 2015. A notice of claim was served on the City on February 17, 2016, 91 days after the date of accident. On April 13, 2016, the City served petitioner a notice rejecting the untimely notice of claim. Petitioner avers she delayed initiating her lawsuit because she was preoccupied with treating her injuries and coping physically, mentally, and emotionally with the disabling effects of her injuries.

Petitioner's prior order to show cause, served on July 12, 2016, seeking the same relief, was denied with leave to renew on February 10, 2017, on the grounds that there were discrepancies regarding the date petitioner sought counsel and served the notice of claim. Specifically, counsel's affirmation and petitioner's affidavit indicated petitioner sought counsel on February 6, 2016. Counsel's affirmation further indicated that the notice of claim was served on February 7, 2016.

"Under General Municipal Law § 50-e (5), a court considering a petition for leave to serve a late notice of claim upon a public corporation must consider various factors, of which the 'most important, based on its placement in the statute and its relation to other relevant factors' (*Matter of Katsiouras v City of New York*, 106 AD3d 916, 917 [2d Dept 2013], quoting *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 [2008]), is whether the public corporation acquired actual [knowledge] of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter" (*Katsiouras*, 106 AD3d at 917, quoting *Matter of Jackson v Newburgh Enlarged City School Dist.*, 85 AD3d 1031, 1031 [2011]). Additionally, the Court must consider whether there is a reasonable excuse for the delay and whether defendant is substantially prejudiced in its ability to maintain a defense (General Municipal Law § 50-e [5]; *Katsiouras* at 917).

A timely notice of claim is condition precedent to suit (General Municipal Law § 50-e [a]). Service of a notice of claim beyond the 90-day statutory period is a nullity when made without leave of court and does not provide the City with actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter (*Katsiouras* at 918, citing *see Decoteau v City of New York*, 97 AD3d 527 [2012]; *Browne v New York City Tr. Auth.*, 90 AD3d 965 [2011]; *Nappi v County of Suffolk*, 79 AD3d 990, 991 [2010];

Laroc v City of New York, 46 AD3d 760, 761 [2007]; *Matter of White v New York City Hous. Auth.*, 38 AD3d 675 [2007]; *Maxwell v City of New York*, 29 AD3d 540, 541 [2006]; *Mack v City of New York*, 265 AD2d 308, 309 [1999]). Here, the notice of claim was served late without leave of court and is therefore a nullity. Therefore, the untimely notice of claim that was rejected by the City on April 13, 2016, did not itself provide the City with actual knowledge of the essential facts constituting the claim within the statutory period (*Katsiouras* at 918), and petitioner failed to establish with any proof that the City had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

The papers also fail to establish a reasonable excuse for the delay. Excuses for failing to timely serve a notice of claim based on the injuries, medical condition, or incapacity of plaintiff require more than conclusory allegations by petitioner or petitioner's counsel (*See Matter of Papayannakos v Levittown Mem. Special Educ. Ctr.*, 38 AD3d 902 [2d Dept 2007], citing *see Matter of Aliberti v City of Yonkers*, 302 AD2d 456 [2003]; *Robertson v New York City Hous. Auth.*, 237 AD2d 501 [1997]; *Matter of Caruso v County of Westchester*, 220 AD2d 746 [1995]). Here, there is no affidavit by petitioner and no documentation to substantiate the excuse proffered in the attorney's affirmation. Although the lack of a reasonable excuse is not necessarily fatal to the granting of leave to serve a late notice of claim, where, as here, there is also a lack of actual notice, it is an improvident exercise of the Court's discretion to grant the petition (62A NY Jur 2d, Government Tort Liability § 440, citing *Hunt v City of New Rochelle*, 223 AD2d 643 [2d Dept 1996]; *Matter of Martin*, 100 AD2d 879 [2d Dept 1984]).

The Court further notes that no explanation has been proffered as to why petitioner waited until July to seek leave to file a late notice of claim when petitioner was aware on

February 17, 2016, that the notice of claim was untimely and, on April 13, 2016, that the untimely notice of claim had been rejected. The City does not argue that it would be prejudiced by this delay, but that petitioner failed to carry her initial burden of showing that the City was not prejudiced (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]), holding “that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice.”). Here, petitioner failed to provide any evidence or argument that respondent would not be substantially prejudiced. Rather, several unavailing arguments were proffered regarding actual notice. Accordingly, the petition is denied.

Dated: August 2, 2017

E N T E R:



Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BOODIE
J.S.C.