

Matter of Gallardo v New York City Tr. Auth.
2018 NY Slip Op 30021(U)
January 3, 2018
Supreme Court, New York County
Docket Number: 152171/17
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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In the Matter of the Claim of
AQUILES GALLARDO,

Petitioner,

DECISION AND ORDER

-against-

Index No.: 152171/17

NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE
TRANSPORTATION OPERATING AUTHORITY,
and JOHN DOE (First and last name being fictitious and
presently unknown but intended to be the driver of the bus
involved in an accident on January 27, 2016),

Respondents.

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

Paper	Numbered	NYCEF #
Petitioner's Motion/ Affirmation/Memo of Law	<u>1</u>	2-8, 11, 12
Defendant's Affirmation in Opposition/Memo of Law	<u>2</u>	13
Plaintiff's Affirmation in Reply/Memo of Law	<u>3</u>	14, 15
Defendants' Supplemental Affirmation in Opposition	<u>4</u>	18-22

Petitioner Aquiles Gallardo seeks an order granting Petitioner leave to file a late notice of claim *nunc pro tunc* pursuant to General Municipal Law § 50-e 5). For the reasons that follow, the petition is denied.

Petitioner was allegedly injured at 6:10 pm on January 27, 2016 in a motor vehicle accident while a passenger in a taxi cab owned by Fons Cab Corporation and operated by Miguel Vacacela. According to the police report, the taxi cab was traveling eastbound on 86th street in Manhattan near its intersection with 1st Avenue, when it swerved and struck a median to avoid an MTA bus that was negligently pulling out of a bus stop.

On November 10, 2016, Petitioner commenced a personal injury lawsuit against Miguel Vacacela and Fons Cab Corp. seeking compensatory damages. During that litigation, Defendants provided Petitioner's counsel the MTA bus identification number, NY-5841. Upon receipt of this new information, Petitioner moved for leave to file a late notice of claim against Respondents New York City Transit Authority ("Transit"), Manhattan And Bronx Surface Transportation Operating Authority ("MABSTOA"), and bus operator ("John Doe").

Pursuant to GML § 50-e (1)(a), a party seeking to sue a public entity must serve a notice of claim on the prospective respondent within ninety days after the claim arises (*Matter of Newcomb v Middle County Cent. Sc. Dist.*, 28 NY3d 455, 460 [2016]). An application to file a late notice of claim may not be made more than one year and 90 days after the cause of action accrued unless the statute has been tolled (GML § 50-i (1); *Asaro v City of New York*, 167 AD2d 130 [1st Dept 1990]). The purpose of the statute is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*Plaza ex rel. Rodriguez v. New York Health and Hospitals Corp. (Jacobi Medical Center)*, 97 AD3d 466 [1st Dept 2012]). The instant application for leave to file a late notice of claim was made a month before the expiration of the one-year-and-90-day period of limitations.

Petitioner's counsel contends that he was not retained until October 25, 2016, nine months after the incident, and since the taxi driver and police report referred only to an "MTA bus," without additional identifying information, there was no meritorious basis for moving for permission to file a late notice of claim until he received an email in February

2017 from counsel for the taxi cab owner that referred to "registration (plate? or number?) NY-5841" which had been noted by the taxi driver at the incident.

Respondents maintain that Petitioner's delay in seeking counsel does not eliminate the necessity to file a notice of claim, and the fact that Petitioner's counsel waited another five months before bringing this motion, when he was aware from the police report that an MTA bus may have been involved in the incident, is not a reasonable excuse for the failure to submit a timely notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (General Municipal Law § 50-e[5]; *Stowe v City of Elmira*, 31 NY2d 814 [1972]; *Jordan v City of New York*, 38 AD3d 336 [1st Dept 2007]).

The key factors the court must consider in determining whether leave should be granted are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense (*Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]). The presence or absence of any one of the foregoing factors is not determinative, and the absence of a reasonable excuse is not, standing alone, fatal to the application (*Id.*).

Petitioner has not offered a reasonable excuse for failing to timely serve the notice of claim, as ignorance of the law is not a valid excuse (*Todd v New York City Health and Hospitals Corp. Office of Legal Affairs, Claims Div.*, 129 AD3d 433 [1st Dept 2015]). Petitioner's counsel asserts that he was not retained until nine months after the date of incident. But he was aware from the police report that an "MTA bus" may have been

involved in the incident and still waited more than four months to serve the notice of claim.

The fact that he did not know the exact identity of the bus itself is not a reasonable excuse.

Nor did Respondents have actual knowledge of the facts underlying the claim as the incident was not reported by the bus driver. Petitioner's affidavit noting that he overheard a conversation between the taxi driver and "a man who referred to 'my bus'" similarly does not provide any basis upon which to impute knowledge to Respondents (*Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447 [1st Dept 2008] [that defendant's employees came to injured plaintiff's aid is insufficient proof that defendants received actual knowledge]).

Finally, as to the issue of substantial prejudice, Petitioner has the burden, initially, to show that the late notice will not substantially prejudice Respondents (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455 [2016]). The "showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice" (*Id.* at 466). Petitioner suggests that Respondents will not be prejudiced because any investigation would involve interviewing the bus driver, who was aware of the incident and who should be readily available.

In opposition under the shifted burden, Defendants have demonstrated with particularized evidence (*Id.* at 467) that they have, in fact, been prejudiced. Respondents have not been afforded the opportunity to conduct a statutory hearing of Petitioner to determine the essential facts, nor have they been able to assign investigators to pursue evidence of the claim. In the course of Defendants' investigation, they obtained the "Operator's Daily Trip Sheet" corresponding to bus number 5841 for the date of the incident and identified the bus driver. The second page of this document, to be completed

in the event of an accident involving the bus, was left blank by the driver. Most significantly, Respondents assert that the bus driver has retired and repeated attempts to contact him have been unsuccessful.

Since Petitioner has not offered a reasonable excuse, demonstrated that Respondents acquired actual knowledge of the essential facts of the incident, or met his burden to show that Respondents would not be substantially prejudiced by the delay, this Court finds that granting leave to serve a late notice of claim against Respondents would be inappropriate.

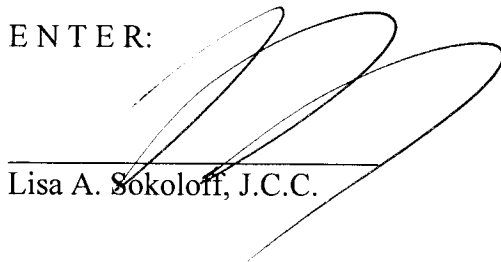
Accordingly, it is hereby

ORDERED and ADJUDGED that the petition for leave to serve a late notice of claim *nunc pro tunc* is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied. This constitutes the Decision, Order and Judgment of the Court.

Dated: January 3, 2018
New York, New York

ENTER:



Lisa A. Sokoloff, J.C.C.