Harris v New York City Hous. Auth.
2018 NY Slip Op 30501(U)
March 23, 2018
Supreme Court, New York County
Docket Number: 155897/15
Judge: Shlomo S. Hagler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

ANTOINE HARRIS,

Petitioner,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----------X

Index No.: 155897/15

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, petitioner Antoine Harris ("Petitioner") moves pursuant to General Municipal Law ("GML") § 50-e (5) ["Section 50-e (5)"] for leave to serve a late notice of claim upon the respondent The New York City Housing Authority ("Respondent"), or for an Order deeming the proposed Notice of Claim attached to the instant Petition as timely served *nunc pro tunc* (Motion Sequence Number 001). Respondent opposes the Petition.

BACKGROUND FACTS

According to the proposed Notice of Claim, Petitioner tripped and fell on a defective, uneven, broken and raised sidewalk located "along the easterly side of 7th Avenue a/k/a Adam Clayton Powell Boulevard between the corners of West 151st Street and West 152nd Street" in New York, New York on May 10, 2015 (the "Accident") (Notice of Petition, Exhibit "A", ¶ 3). The Accident allegedly took place on "an uneven section of the sidewalk running in front of and adjacent to a parcel of land that is designated on the New York City Department of Finance Digital Tax Map of the County of New York as Block 2016 and Lot 60" (*Id.*). Petitioner claims that the Accident occurred due to the "negligence and carelessness of the Respondent in the manner in which it owned, operated, maintained[,] managed and controlled the aforesaid

sidewalk and surrounding area" (*Id.*). Petitioner further alleges that, as a result of the Accident, she sustained "multiple bodily injuries" (*Id.*, ¶ 4).[1]

Petitioner's counsel states that on or about July 9, 2015, he sent a Freedom of Information Law ("FOIL") request to the New York City Department of Transportation (the "DOT") about the subject location.[2] Petitioner's counsel claims that his firm did not receive the requested records from the DOT until almost one hundred-fifty days after the request was submitted. Petitioner maintains that it was only until such information was received, did Petitioner learn that the subject location is owned by Respondent and not by the City (Notice of Petition [Affirmation in Support], ¶¶ 6-7). Petitioner also claims that on or about July 14, 2005, a notice of claim was served upon the City (*Id.*, Exhibit "E").

It is undisputed that on or about December 17, 2015, over four months beyond the ninety-day statutory deadline for serving a notice of claim, Petitioner served Respondent with the subject Petition seeking to serve a late notice of claim (Petitioner's Memorandum in Support at 3; Affirmation in Opposition, ¶ 5; Tr. Oral Argument at 5).[3]

---

[1]Petitioner fails to further identify her injuries.

[2]Petitioner's counsel also claims to have done a "due diligence search of the records through the New York City Buildings Department [w]ebsite" regarding the location of the Accident. Petitioner claims that said search revealed that the subject property was owned by the City of New York (the "City"). However, nowhere in the attached print-out submitted as proof of such search results, does it so indicate, but rather shows that the address is located at the "Harlem River Houses Bldg 7" (Notice of Petition, Exhibit "D").

[3]The Notice of Petition attaches as Exhibit "A" the proposed Notice of Claim which Petitioner seeks to deem timely served *nunc pro tunc*. Petitioner also seemingly served Respondent directly with a Notice of Claim on or about December 17, 2015 (Notice of Petition, Exhibit "B").

DISCUSSION

Notice of Claim

Pursuant to GML § 50–e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective respondent "within ninety days after the claim arises" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016]; *see Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 674 [2016]; *In re Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018]. The instant proceeding for leave to serve a late notice of claim was commenced on or about December 17, 2015, seven months after Petitioner's May 10, 2015 Accident and over four months after the statutory deadline for serving a timely notice of claim.

GML Section 50-e (5) which governs applications to file a late notice of claim, permits a court in its discretion to extend the time for a petitioner to serve a notice of claim. Under that section, a court is required to consider factors, including as is pertinent here, "whether there was [(1)] a reasonable excuse for the delay [in service], [(2)] actual knowledge on the part of [the respondent] of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and [(3)] substantial prejudice to [the respondent] due to the delay" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 463). "The lower courts have broad discretion to evaluate the factors set forth in General Municipal Law § 50-e (5). At the same time, a lower court's determinations must be supported by record evidence" (*Id.* at 465 [internal citations omitted]). "[W]hile 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" (*In re Townson v New York City*

Health & Hosps. Corp., 158 AD3d 401 [1st Dept 2018] [internal citation and quotation marks omitted]).

It is well established that "the absence of a reasonable excuse is not, standing alone, fatal to [an] application" to file a late notice of claim (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016] [internal citation and quotation marks omitted]). With respect to the actual knowledge requirement, Section 50-e (5) "'contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory'" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *In re Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018]). Mere knowledge of the underlying facts does not establish knowledge of the claim (*Id.*). Regarding the prejudice showing required under Section 50-e (5), a petitioner must "make an initial showing that the public corporation will not be substantially prejudiced and then [t]he public corporation [must] rebut that showing with particularized evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 467).

Reasonable Excuse

Petitioner's counsel argues that his firm timely filed a FOIL request with the DOT in order to determine which entity owned the subject location but only received the requested information almost one hundred-fifty days thereafter. Petitioner then filed the instant Petition within a reasonable amount of time after receipt of the FOIL results (*see* Notice of Petition

[Affirmation in Support] ¶ 6; Reply Affirmation, ¶ 4).[4] In opposition, Respondent argues that the failure to ascertain the owner of the subject property, when such information is readily available, is the result of a lack of due diligence by Petitioner's counsel, and as such, amounts to law office failure which does not constitute a reasonable excuse. Respondent maintains that multiple searches, such as on the Automated City Register Information System ("ACRIS"), on the New York City Open Accessible Space Information System ("OASIS") or a title search, would have revealed that Respondent is the owner of the subject property. Respondent further argues that the fact that Petitioner was able to ascertain the block and lot numbers of the subject property belies his claim that he could not determine the owner of the property without a FOIL request to the DOT (Memorandum in Opposition, at 3-6).

"Petitioner's service of a notice of claim on the City of New York does not excuse her failure to serve the Housing Authority within the statutory period" (*Matter of Feysher C. v New York City Hous. Auth.*, 149 AD3d 509, 510 [1st Dept 2017]; *see Kelly v City of New* York, 153 AD3d 1388, 1389 [2d Dept 2017]; *Matter of Abramovitz v City of New York*, 99 AD3d 1000, 1001 [2d Dept 2012] ["petitioner's excuse that he only recently came to realize that he may now have a claim against [the New York City Transit Authority] [in addition to the City of New York which was timely served] was unacceptable"; *Bridgeview at Babylon Cove Homeowners Assn., Inc. v Incorporated Vil. of Babylon*, 41 AD3d 404, 405 [2d Dept 2007] ["[t]he plaintiff's failure, however, to properly research the entity that owned the dock in the first instance was not an

---

[4]Petitioner's counsel states that the subject Petition was served four days after he learned from the FOIL information that Petitioner had served the wrong entity (the City) (Tr. Oral Argument at 5).

acceptable excuse"]; *Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 1995] [petitioner's attorney's affirmation stating that the firm 'only recently' became aware that the owner of the premises was the New York City Housing Authority, "amount[ed] to nothing more than law office failure, *i.e.*, to properly research what entity owned the property in the first instance. The fact that the City of New York was properly and timely served is of no moment as the owner of the building ... could easily have been ascertained"]; *Pavone v City of New York*, 170 AD2d 493, 493 [2d Dept 1991] ["[A]lthough a notice of claim was served within 90 days, it was served on an improper entity (the New York City Hous. Auth.) despite the fact that the correct entities (the municipal defendants herein) easily could have been ascertained"]).

Here, petitioner's failure to identify the proper party to sue fails to constitute a reasonable excuse within the meaning of GML Section 50-e (5). There were available to Petitioner multiple sources, accessible to the public, to investigate the owner of the subject property such as ACRIS, OASIS, or a title search. In fact, Petitioner submits a Department of Buildings ("DOB") Property Profile Overview obtained by Petitioner on or about July 9, 2015 from the DOB's website which provides that the property is part of the Harlem River Houses, which with minimal further research, would have revealed that this development is owned by Respondent.

Actual Knowledge

"The actual knowledge requirement contemplates actual knowledge of the essential facts constituting the claim not knowledge of a specific legal theory" (*In re Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018] [internal citation and quotation marks omitted]). "[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim" (*Id.*; *Matter of Schifano v City of New York*, 6 AD3d 259, 260 [1st Dept 2004] [internal

quotation marks and citation omitted). "Knowledge that [plaintiff] was allegedly injured does not establish actual notice of her claim that defendants were negligent" (*Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447, 447 [1st Dept 2008]). "What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (*Matter of Henriques v City of New York*, 22 AD3d 847, 848 [2d Dept 2005] [internal citation and quotation marks omitted]).

Here, Petitioner maintains that Respondent had actual notice of the essential facts constituting her claim. Petitioner argues that because Respondent received a notice of violation from the DOT on May 8, 2012 ("2012 Notice of Violation") for sidewalk defects on the same block as the occurrence, Respondent had actual knowledge of the subject claim (Notice of Petition [Affirmation in Support], ¶ 6; *Id.*, Exhibit "G" [2012 Notice of Violation]).

It is certainly not clear that the Notice of Violation pertains to the same defect allegedly giving rise to the subject occurrence. The copy of the 2012 Notice of Violation submitted by Petitioner is almost entirely illegible. With a strained reading, this Court can discern that the violation was issued on property located between West 152nd Street and West 153rd Street also known as "2621 Adam C Powell Blvd." (*Id.*). In her proposed Notice of Claim, Petitioner alleges that the Accident occurred on the sidewalk on Adam Clayton Boulevard between the corners of West 151st Street and West 152nd Street, not between West 152nd Street and West 153rd Street as the 2012 Notice of Violation seems to indicate (*see* Notice of Petition, Exhibit "A"). Even if it could be established that a defect set forth in the 2012 Notice of Violation was the same as the defect being alleged herein, the 2012 Notice of Violation would not in any event

constitute actual knowledge of the claim, namely that Respondent's negligence was causally connected to the Accident (*see Facey v City of New York*, 150 AD3d 826, 827 [2d Dept 2017]). Petitioner has therefore failed to establish that Respondent acquired actual knowledge of the essential elements constituting the claim within the 90-day statutory period or within a reasonable time thereafter.[5]

Prejudice

In *Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 465-468 [2016]], the Court of Appeals clarified the burden of proof regarding the issue of substantial prejudice which a court must consider in determining whether to extend the time for a petitioner to serve a Notice of Claim. The Court held "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" (*Id.* at 466). "The rule we endorse today-requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence-strikes a fair balance" (*Id.* at 467).

In her moving Petition and supplemental submissions, Petitioner maintains that there is no prejudice to Respondent occasioned by the delay in serving the subject late Notice of Claim.

---

[5]Petitioner also argues that a "Big Apple Map" submitted as an Exhibit to the Notice of Petition confers actual knowledge upon Respondent (Notice of Petition, Exhibit "G"). However, the map is dated 2016 and is unauthenticated, and in any event cannot serve to give Respondent actual knowledge of the essential facts of Petitioner's claim (*see Matter of Gomez v City of New York*, 250 AD2d 443 [1st Dept 1998]).

Petitioner's argument of lack of prejudice relies on the most part upon the assertion that Respondent had actual knowledge of the essential facts of her claim as a result of (1) the 2012 Notice of Violation; (2) photographs of the subject area taken on May 12, 2015, two days after the Accident, some of which show a sidewalk shed; and (3) the Big Apple Map depicting the subject area.[6] Such argument is unavailing.

First, Petitioner relies on the 2012 Notice of Violation as proof that Respondent had notice of the subject sidewalk defect. However, as discussed above, the proffered 2012 Notice of Violation is illegible and purportedly identifies a violation located on a different block than the subject defect being claimed herein. Assuming arguendo that the 2012 Notice of Violation pertained to the same defect that allegedly caused the Accident, such Notice does not confer knowledge of the claim to Respondent - i.e. it fails to connect the occurrence of the Accident with the negligence of Respondent (*see Matter of Maldonado v City of New York*, 152 AD3d 522, 523 [2d Dept 2017]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Walker v New York City Tr. Auth.*, 266 AD2d 54, 55 [1st Dept 1999]). Second, the submitted photographs are not competent evidence. Petitioner fails to attach an affidavit or other sworn testimony authenticating the photographs to demonstrate that they fairly and accurately depict the sidewalk condition at the time of the Accident. As such, Petitioner's argument that the photographs would enable Respondent to reconstruct the conditions as they existed on the date of the Accident is unavailing. Further, the depiction of a sidewalk shed in the unauthenticated

---

[6]Petitioner also argues there is no prejudice to Respondent given that there was only a four month delay in serving Respondent with the Notice of Claim (Petitioner's Memorandum of Law in Support at 3).

photographs fails to provide notice to Respondent of the subject claim. Petitioner's claim that a shed at the location purportedly installed prior to the Accident is proof that there must have been conditions present requiring a shed for protection, is likewise unavailing and conclusory. Third, a notice of a violation on a "map filed by the Big Apple Pothole and Sidewalk Protection Corporation does not give respondent actual knowledge of the essential facts constituting petitioner's claim" (*Matter of Gomez v City of New York*, 250 AD2d 443, 443 [1st Dept 1998]). Further, the submitted Big Apple Map reveals a 2106 date, approximately one year after the Accident.

Petitioner has therefore failed to satisfy her burden to present "some evidence or plausible argument" to support a finding of lack of substantial prejudice to Respondent (*see generally Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Rodriguez v Metropolitan Transp. Auth.*, 155 AD3d 520, 522 [1st Dept 2017]; *Matter of Maldonado v City of New York*, 152 AD3d 522, 523 [2d Dept 2017]; *Matter of Grajko v City of New York*, 150 AD3d 595, 596 [1st Dept 2017] (petitioner "does no more than refer to numerous construction records that purportedly could be examined, yet provides no names of actual witnesses nor any reference to specific information in those records").

Given that Petitioner has failed to satisfy her burden to show lack of prejudice to Respondent, the burden does not shift to Respondent to make a particularized evidentiary showing that it would be substantially prejudiced if a late notice of claim is allowed (*see Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Rodriguez v Metropolitan Transp. Auth.*, 155 AD3d at 522; *Matter of Maldonado v City of New York*, 152 AD3d at 523).

CONCLUSION

Accordingly, it is hereby

ORDERED, that the Petition of Petitioner Antoine Harris pursuant to General Municipal Law § 50-e (5) for leave to serve a late Notice of Claim on Respondent The New York City Housing Authority, or for an Order deeming the Notice of Claim attached to the instant Petition as timely served *nunc pro tunc*, is denied.

Dated: March 23, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.