

Ojo v Friends of Jacob K. Javits Convention Ctr.

2018 NY Slip Op 31474(U)

February 5, 2018

Supreme Court, New York County

Docket Number: 159104/2015

Judge: Carmen Victoria St. George

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34**

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FOLASADE ODEDINA OJO,

Plaintiff,

Index No. 159104/2015

Motion Sequence 001

-against-

Decision and Order

FRIENDS OF JACOB K. JAVITS CONVENTION CENTER,
INC., and NEW YORK CONVENTION CENTER OPERATING
CORPORATION D/B/A JACOB K. JAVITS CONVENTION
CENTER, INC.,

Defendants.

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CARMEN VICTORIA ST. GEORGE, J.S.C.:

This is an action by plaintiff, Folasade Odedina Ojo (hereinafter "Ojo"), to recover damages for personal injuries she claims to have sustained on September 16, 2014 at the Jacob K. Javits Convention Center. Defendant New York Convention Center Operating Corporation (NYCCOC) now moves for summary judgment upon the grounds that Ojo failed to serve NYCCOC with a timely notice of claim and is now precluded from doing so. Ojo opposes the motion and cross-moves for leave to file a late notice of claim *nunc pro tunc* pursuant to General Municipal Law § 50-e(5) ("GML").

The underlying facts herein demonstrate that Ojo was allegedly injured when she slipped and fell down the stairs at the Javits Center on September 16, 2014. Ojo, a nurse with Woodhull Medical & Mental Health Center, was attending the New York State Nurses Association Annual Meeting at the time of the incident. She sustained injuries to her right calf and fractured her right ankle. It is undisputed that an accident report was completed by NYCCOC personnel at the time of the accident. Thereafter, this action was commenced by the filing of a summons and complaint

on or about September 2, 2015. On October 26, 2015, a supplemental summons and complaint was filed. On November 20, 2015, NYCCOC interposed an answer.

NYCCOC moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint on the ground that Ojo failed to serve it with a notice of claim as required by GML § 50-e and Public Authorities Law § 2570¹ (PAL). In support of its motion, NYCCOC submits an affirmation from Bradley Siciliano, Senior Vice President, Corporate Secretary & General Counsel of NYCCOC. Siciliano avers that he conducted a search and concluded that Ojo never served his office with a notice of claim related to this action. In addition, NYCCOC contends that Ojo was required to move for leave to file a late notice of claim within one year and 90 days after the accrual of the claim (*see* GML § 50-e [5]). NYCCOC claims that Ojo did not seek leave to file a late notice of claim until August 2016, eight months after the expiration of the statute of limitations. Therefore, NYCCOC argues, the court is without the authority to grant such relief at this juncture.

In opposition, Ojo contends that NYCCOC had full knowledge and notice of the claims within the statutory 90-day period. Ojo asserts that the accident report, created by NYCCOC personnel at the time of the accident, qualifies as a timely notice of claim because it contains facts that are identical to that which would have been included in a notice of claim pursuant to GML § 50-e (2). Ojo states that the accident report contains the following items called for by GML § 50-e (2): (1) the name and post-office address the claimant; (2) the nature of the claim; (3) the time when, the place where, and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable. In addition, Ojo argues that NYCCOC did not suffer any prejudice because they were in possession of the accident report.

¹ Public Authorities Law § 2570 provides: “A notice of claim, served in accordance with the provisions of section fifty-e of the general municipal law, shall be a condition precedent to the commencement of an action against the corporation, its directors, officers, employees, or agents. No such action shall be commenced more than one year and ninety days after it has accrued....”

Further, Ojo maintains that the failure to timely file a notice of claim can be attributed to NYCCOC's own actions. In particular, she asserts that NYCCOC misled the public as to its public benefit corporation status. Ojo alleges that counsel for NYCCOC deliberately withheld information from plaintiff's counsel by not mentioning the need for a notice of claim despite numerous communications between the offices. Ojo also emphasizes that NYCCOC did not plead any affirmative defenses regarding the notice of claim. In light of this, Ojo contends that NYCCOC's motion for summary judgment should be denied on the ground of equitable estoppel.

On her cross-motion, Ojo argues that the court should grant her leave to file a late notice of claim *nunc pro tunc*. Ojo restates much of what is contained in her opposition, arguing that defense counsel deliberately hid the fact the NYCCOC was to be treated differently from an ordinary corporation, and that a notice of claim was required to be served upon it. Further, Ojo emphasizes that any connection between NYCCOC and the Public Authorities Law is not publicly made known. While Ojo does not dispute that PAL § 2570 calls for service of claim upon NYCCOC, she maintains that no where does the NYCCOC advise that it is a public benefit corporation. Ojo further claims that when performing online searches as to NYCCOC, the public is misled to believe that NYCCOC is simply a private corporation that manages the Javits Center. In support of these claims, Ojo submits two articles purporting to show that NYCCOC held itself out as a private corporation.

Ojo further reiterates that NYCCOC should be equitably estopped from raising the defense of untimely service of the notice of claim. Ojo relies upon the Court of Appeals decision in *Bender v New York City Health and Hospitals Corporation*, 38 NY2d 662 (1976), to support her position. The issue in *Bender* was whether equitable estoppel could be applied to notice of claim situations. In *Bender*, a notice of claim was timely served upon the City of New York, but not on the then,

newly created Health and Hospitals Corporation (HHC). However, the City's Corporation Counsel, who represented both entities, did not notify the plaintiff that HHC had been improperly served. Despite the fact that HHC was never served with a notice of claim, it nevertheless defended plaintiffs' actions, medically examining both, and taking testimony from one of the plaintiffs. Ojo points to the *Bender* opinion which states in part ". . . [a]t no time did Corporation Counsel . . . inform claimants or counsel that the notice had been filed with the wrong agency, or that notice should have been served on the Health and Hospital's Corporation" (Ojo cross-motion at 17 citing *Bender*, 38 NY2d at 666). In *Bender*, defense counsel moved to dismiss for failure to comply with its notice of claim provisions and plaintiff's counsel cross-moved to file a notice of claim *nunc pro tunc*. The motion in *Bender* was more than one year and 90 days from the date the cause of action, as is the case here. According to Ojo, the Court of Appeals held that the defendants in *Bender* were estopped from dismissing plaintiff's complaint on the grounds that there was a failure to serve a notice of claim.² Ojo maintains that the facts of her case are analogous to the facts in *Bender* in that their respective adversaries engaged in conduct that was calculated to mislead the timely notice of claim. In sum, Ojo maintains that *Bender* is applicable to the instant case and NYCCOC should be estopped from seeking dismissal of her complaint.

In reply,³ NYCCOC argues that none of Ojo's arguments can overcome the fact that a notice of claim was not filed within the statute of limitations and the Court lacks the authority to permit the service of a late notice of claim at this time. To the extent that Ojo argues that the accident report serves as a notice of claim, NYCCOC asserts that this argument is without merit

² Ojo mischaracterizes the holding in *Bender*. In *Bender*, the Court of Appeals, for the first time, adopted the doctrine of estoppel in the notice of claim area, however the Court remitted the case to Special Term "for a consideration of evidentiary facts as to whether or not there should be an estoppel." It is also worth noting that *Bender* involved two separate medical malpractice actions, both of which were against the HHC. However, Ojo's discussion of *Bender* does mention that.

³ NYCCOC submitted an Affirmation in Reply to Plaintiff's Affirmation in Opposition to Summary Judgment dated September 2, 2016 and an Affirmation in Opposition to Plaintiff's Cross-Motion dated September 2, 2016.

under the prevailing case law (*Mittermeier v State of New York*, 101 AD3d 426 [1st Dept 2012]). NYCCOC dismisses Ojo's allegation that NYCCOC engaged in misleading conduct by concealing its public authority status. Further, NYCCOC maintains that Ojo was put on notice of its public status by way of its answer where it pled that "NYCCOC is a public benefit corporation." NYCCOC states that the answer was served on November 20, 2015, which was prior to the statute of limitations. NYCCOC further argues that it was under no obligation to plead Ojo's failure to comply with the statutory notice requirement as an affirmative defense in its answer. Additionally, NYCCOC stresses that the courts have recognized that the holding in *Bender* addressed an unusual factual situation, is of very limited application, and should not be read as diminishing the vitality of the general rule that equitable estoppel should not be invoked against agencies of the State acting in a governmental capacity citing *Rodriguez v City of New York*, 169 AD2d 532 (1st Dept 1991) in support. In *Rodriguez*, the Court held that a municipal defendants' awareness that service of notice of claim was untimely, and their failure to advise plaintiff of that fact, did not constitute wrongful conduct which would estop them from challenging the timeliness of the notice and the City's proceeding with litigation did not waive its right to assert untimeliness of the notice of claim (*Rodriguez*, 169 AD2d at 533).

In response to NYCCOC's opposition to the cross-motion, Ojo argues that NYCCOC's reliance on *Rodriguez v. City of New York* is misplaced. Ojo concedes that her case is similar to *Rodriguez* to the extent that *Rodriguez* failed to make a motion to serve a late notice of claim within the applicable statute of limitations and argued that the municipal defendants' wrongful conduct called for applying equitable estoppel. Further, Ojo notes that the *Rodriguez* Court declined to apply equitable estoppel based on one action/inaction on the part of the municipal defendant stating "their mere failure to apprise plaintiff of the untimeliness of the notice of claim

. . . does not constitute wrongful conduct such as to warrant. . .the finding of an estoppel” (Ojo affirmation in reply at 9-10 citing *Rodriguez*, 169 AD2d at 533). Ojo asserts there was more than “mere failure” on the part of NYCCOC and its counsel. In particular, she alleges the parties engaged in discovery and had numerous communications through letters, phone calls and emails without raising the untimeliness of the notice of claim. Further, Ojo stresses, the actions taken by the defendant itself- referring to its online publications, are misleading and the requirement to serve the NYCCOC as public benefit corporation is not readily known.

To the extent that NYCCOC plead in its answer that it was a public benefit corporation, Ojo argues that did not, in and of itself, establish a notice of claim was required. Ojo claims that public benefit corporations are created under Article 17 of the New York Business Corporation Law. She states “[a] reading of all sections thereunder does not show any statutory authority designation of a Public Benefit Company being a municipal entity” and adds that there is no requirement for service of a Notice of Claim under Article 17 (Ojo affirmation in reply at 11). As such, Ojo maintains, that at a minimum, she would be given the opportunity to show the extent of the action or inaction on the part of the NYCCOC and defense counsel, and how this caused the failure to file a late notice of claim.

Discussion

The timely filing of a notice of claim is a statutory condition precedent to the commencement of an action against a public corporation (GML § 50-e; *see Campbell v City of New York*, 4 NY3d 200 [2005]). A party seeking to sue a public corporation must serve a notice of claim on the prospective defendant within 90 days after the claim arises (*see* GML § 50-e[1][a]). The purpose of the notice of claim is to provide a municipal authority with the opportunity to investigate the claim (*Goodwin v New York Hous. Auth.*, 42 AD3d 63, 68 [1st Dept 2007]). The

notice must set forth the time, the place, and the manner in which the claims arose (*Brown v City of New York*, 95 NY2d 389, 393 [2000]). Where the filing would be more than 90 days after the occurrence, the claimant must seek the court's permission to file a late notice of claim (GML § 50-e [5]). Pursuant to GML § 50-e (5), the Court has discretion to grant leave to serve a late notice of claim under certain statutorily permitted circumstances. However, the Court is without discretion to permit service of a late notice of claim after the expiration of the one year and 90-day statute of limitations (*see* GML §50-e [5]; PAL § 1212[2]; *Pierson v City of New York*, 56 NY2d 950, 954-956 [1982]; *Singleton v City of New York*, 55 AD3d 447 [1st Dept 2008]).

Here, Ojo failed to serve a notice of claim upon NYCCOC within the requisite 90 day period (*see* GML § 50-e[1][a]) and further failed to move for leave to serve a late notice of claim within one year and 90 days of the date the claim accrued, which ended on December 16, 2015. Such a failure deprives this Court of authority to deem the notice of claim timely served *nunc pro tunc* or permit late service of a notice of claim (*Pierson*, 56 NY2d at 954 [holding that the court is precluded from granting an application to file a late notice of claim when the extension would exceed the statute of limitations]). However, Ojo does not dispute that she failed to file a timely notice of claim nor is she seeking to overturn the long-standing rule involving motions to file late notices of claim, *nunc pro tunc* established in *Pierson*. Instead, Ojo is arguing that this is one of those unusual factual scenarios necessitating the application of *Bender* and as such the doctrine of equitable estoppel should apply. In the alternative, Ojo asserts that the accident report prepared by NYCCOC personnel is a valid substitute for a timely notice of claim. This Court will first address whether NYCCOC's conduct raises a triable issue of fact as to whether equitable estoppel applies, which would be sufficient to defeat summary judgment.

Equitable Estoppel

In *Bender v. New York City Health & Hospitals Corp.*, the Court of Appeals, held that the doctrine of equitable estoppel may be invoked to prevent a municipal defendant from asserting that a notice of claim is untimely, in those situations “where a government subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised” (*Bender*, 38 NY2d at 668). The doctrine of equitable estoppel can arise in a notice of claim situation where the governmental entity engages in “positive acts, or omissions where there was a duty to act” (*Bender*, 38 NY2d at 668). *Bender* is significant because it was the first time that the Court of Appeals applied the doctrine of equitable estoppel to a government agency, however, the Court remanded the matter for an evidentiary hearing on the issue of estoppel.

We are mindful that the doctrine of equitable estoppel should be invoked against government entities sparingly and only under exceptional circumstances (see *Rodriguez v City of New York*, 169 AD2d 532, 533 [1st Dept 1991], quoting *Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 93-94 [1981]; *Feliciano v New York City Hous. Auth.*, 123 AD3d 876, 877 [2d Dept 2014]). Upon review of the record, this Court agrees with Ojo’s contention that NYCCOC’s conduct was more than just the mere failure to apprise the plaintiff of the untimeliness of the notice of claim. This Court recognizes that participation in discovery proceedings does not preclude a defendant from raising the untimeliness of the notice of claim (see *Hall v City of New York*, 1 AD3d 254, 256 [1st Dept 2003]). Further, it is a clear that a defendant is not required to raise the late service or lack of service of a notice of claim as an affirmative defense (*Singleton*, 55 AD3d at 447). Nonetheless, the specific factual history and the conduct of the parties herein, namely: the

various communications between the parties, the misleading omissions, the online publications, and the lack of transparency in terms its public benefit corporation status suggests NYCCOC may have wrongfully or negligently engaged in conduct that misled Ojo to justifiably believe that service of a notice of claim was unnecessary. That said, the record before this Court does not present facts sufficient to resolve whether equitable estoppel applies here. As such, this Court requires further elucidation of the facts as to whether NYCCOC should be equitably estopped from raising the defense of untimely service of the notice of claim which can only be resolved by conducting an evidentiary hearing.

Accident Report

Contrary to Ojo's contention, the accident report cannot serve as a substitute for a timely notice of claim. While the information in the accident report does satisfy a majority of the requirements set forth under GML § 50-e (2) including the nature of the claim, the injury, the time, place and manner in which the claim arose, it was not sworn to by Ojo (GML § 50-e[2] ["[f]orm of notice; content requires that a notice of claim "be in writing, sworn to by or on behalf of the claimant"]). For this reason, this Court rejects Ojo's position that the accident report should qualify as a timely notice of claim.

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is denied without prejudice; and it is further

ORDERED that plaintiff's cross-motion to file a late notice of claim *nunc pro tunc* is denied; and it further

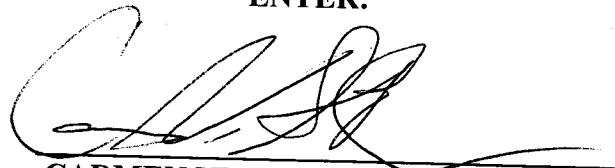
ORDERED that the parties are to appear at 80 Centre Street, Room 308, for an evidentiary hearing, to determine whether the defendant should be estopped from asserting the defense of

untimely service of the notice of claim. The parties are directed to contact the Part Clerk in order to schedule the hearing.

This constitutes the decision and order of this Court.

Dated: February 5, 2018

ENTER:



**CARMEN VICTORIA ST. GEORGE,
J.S.C.**

**HON. CARMEN VICTORIA ST. GEORGE
J.S.C.**