

Royal Day Care LLC v PB 2180 Pitkin Ave LLC

2018 NY Slip Op 32949(U)

November 8, 2018

Supreme Court, Kings County

Docket Number: 505104/2018

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At I.A.S. 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 8th day of November 2018.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

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ROYAL DAY CARE LLC,

Plaintiff,

Index No. 505104/2018
Cal. No. 42

-against-

DECISION AND ORDER

Mot. sup. 4

PB 2180 PITKIN AVE LLC, PHILIP R. BALDEO,
NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, NEW YORK CITY FIRE
DEPARTMENT,

Defendants.

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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 Motion & 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 motion to renew, pursuant to CPLR 2221 (e), the July 26, 2018 decision and order of the Honorable Reginald A. Boddie is as follows:

Plaintiff is seeking to renew its application for leave to file a late notice of claim. On July 26, 2018, plaintiff's motion was denied as untimely. Specifically, the Court found that plaintiff

failed to seek leave to file a late notice of claim within one year and ninety days of the accrual of plaintiff's cause of action.

On or about June 25, 2014, plaintiff, a child daycare provider, entered into a lease agreement for the premises located at 2186-2188 Pitkin Avenue, in Brooklyn, with defendant PB 2180. Plaintiff avers, prior to its tenancy, this property was used to run a daycare which was involved in a criminal scheme to defraud the City. This scheme, known as Operation Pay Care, ran from 2007 to 2010, and included bribing City employees to overlook fire safety violations which would have precluded the issuance or renewal of permits. Carlos Montoya, a former supervising fire inspector, in furtherance of this scheme, issued fraudulent certificates of occupancy in 2012, to the plaintiff's predecessor lessee to run a daycare on the premises.

Shortly after plaintiff's lease commenced in July 2014, plaintiff discovered flooding in the basement. On February 26, and March 19, 2015, defendant New York City Department of Health and Mental Hygiene (DOHMH) issued permits to plaintiff to operate a daycare, which plaintiff thereafter allegedly did. In July 2015, plaintiff discovered that the flooding in the basement was occurring because raw sewage was backing up from a waste line that was illegally connected to the storm sewer. The property was subject to ongoing leaks and flooding. In August 2015, plaintiff contacted defendants PB 2180 and Baldeo and demanded "that the sanitary waste from the bathroom be legally connected to the storm line to stop raw sewage backing up along with the storm water."

On or about March 24, 2017, DOHMH renewed plaintiff's operating permits. In August 2017, a bathroom ceiling collapsed prompting plaintiff to call a plumber. On November 6, 2017, a plumbing inspection revealed violations of the 1986 Administrative Building Code. On

December 8, 2017, plaintiff ceased operating the daycare, in part, because defendants PB 2180 and Baldeo failed to legally connect the storm line and the plumbing was not installed to Building Code standards. On December 15, 2017, an engineering inspection revealed significant structural flaws and recommended a Code compliance study. On February 6, and March 12, 2018, the New York City Department of Buildings (DOB) issued violations for the building. Plaintiff alleges defendants DOHMH, DOB, and FDNY are liable for fraud in the inducement, negligent misrepresentation, negligence, gross negligence, and private nuisance for issuing permits for the premises which should never have been issued and in failing to detect code violations prior to December 2017.

A cause of action based upon fraud accrues at the time the plaintiff “possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence” (*Clarke-St. John v City of New York*, 164 AD3d 743, 744 [2d Dept 2018], quoting *Town of Poughkeepsie v Espie*, 41 AD3d 701, 705 [2d Dept 2007]; see *Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2d Dept 2015]). Here, plaintiff claims the City negligently issued and renewed permits in 2015 and 2017, and failed to find code violations prior to December 2017. However, plaintiff admits to discovering, in July 2015, that the flooding was occurring because of an illegally connected waste line and demanding, in August 2015, that defendants PB 2180 and Baldeo remedy the illegally connected line.

General Municipal Law § 50-e (1) (a) requires service of a notice of claim within 90 days after the claim arises “[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation.” Here, the facts upon which plaintiff’s claim arose date back to acts of fraud

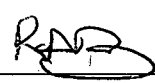
committed in between 2007 and 2012, and DOHMH's alleged negligence in issuing permits in 2015 and renewing them in 2017. Even assuming, as plaintiff alleges, the City was negligent in issuing permits for the daycare and failing to discover code violations prior to 2017, plaintiff's claim against the City was the same in July 2015, when it discovered the illegally connected sewer line. Therefore, the Court finds plaintiff's cause of action arose in July 2015. Moreover, despite ongoing leaks and flooding and plaintiff's allegedly unanswered demand to PB2180 and Baldeo to legally connect the waste line, plaintiff took no action to address what it knew was an illegal condition for two years. Consequently, the 90-day notice period, pursuant to General Municipal Law § 50-e [1] [a], has long passed.

"Upon application, the court, in its discretion, may extend the time to serve a notice of claim . . . [but] extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation" (General Municipal Law § 50-e [5]). Where, as here, a claimant fails to apply for leave to serve a late notice of claim within one year and 90 days following the date that the claims accrued, the court is without authority to grant such relief (*e.g.* *Sun v City of New York*, 131 AD3d 1015, 1016 [2d Dept 2015]). Here, plaintiff's time to commence the action ran in or about October 2016, one year and 90 days from the time plaintiff learned of the illegal waste line connection while in possession of DOHMH permits to operate the daycare.

A motion to renew, as here, "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]).

Here, plaintiff has failed to meet this burden. Accordingly, plaintiff's motion to renew its application for leave to file a late notice of claim is denied.

E N T E R:



HON. REGINALD A. BODDIE
J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court