Matter of Rodriguez v City of New York
2019 NY Slip Op 31257(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 160997/2018
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

JOSE RODRIGUEZ,

Petitioner,

for Leave to Serve and File Late Notice of Claim against

THE CITY OF NEW YORK,

Respondent.

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Index No. 160997/2018

DECISION and ORDER

Mot. Seq. #001

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Jose Rodriguez ("Petitioner") brings this action pursuant to General Municipal Law ("GML") § 50-e for an Order deeming that the Notice of Claim served on November 13, 2018, is timely served against Respondent The City of New York ("Respondent"). The Notice of Claim seeks to recover for the serious injuries sustained by Petitioner on May 22, 2018 at the 24th Precinct of the New York City Police Department ("NYPD") located at 151 West 100th Street, in Manhattan (the "Subject Premises"). The Subject Premises is allegedly owned, operated and controlled by the Respondent.

Petitioner alleges that on May 22, 2018 at approximately 7:35 a.m., Petitioner tripped and fell over a patrol bag placed behind the roll call formation in the muster room at the Subject Premises. Petitioner contends that the fall was a result of the carelessness and negligence of Respondent. Petitioner contends that he suffered serious injuries, including a torn meniscus. Petitioners commenced this action on November 26, 2018 by filing a Verified Petition. Respondent opposes.

Parties' Contentions

Here, according to the Notice of Claim, the date of the incident is May 22, 2018. Therefore, the deadline to file the Notice of Claim upon Respondent was August 20, 2019. Petitioner served the Notice of Claim upon Respondent on November 14, 2018, and therefore failed to serve a Notice of Claim within the

requisite 90 day period. Petitioner brought the pending motion for leave to serve a late Notice of Claim on November 14, 2018, which is 86 days after the expiration of the 90 day period and which is within one year and 90 days of the date the claim allegedly accrued and within the applicable statute of limitations.

Petitioner contends that Respondent acquired actual knowledge of the facts and circumstances establishing the claim within 90 days of May 22, 2018. More specifically, Petitioner contends that the "Line-of-Duty Injury Report", "Aided Report Worksheet" and "Witness Statement" reports (collectively, the "Reports") were prepared by the NYPD on the same day the accident occurred. Petitioner argues that the Reports provide a connection between the accident and the negligence of Respondent. Petitioner further argues that at the time of the accident he was employed by the NYPD and was acting within the scope of his duties as a police office, and that alone is enough to afford Respondent with actual knowledge. Furthermore, Petitioner asserts that he has been "repeatedly" examined for his injuries by police surgeons, to determine the nature and extent of the injuries Petitioner sustained.

Petitioner argues that Respondent will not be prejudiced in its ability to investigate or in its ability to defend against Petitioner's claim. Petitioner contends that Respondent was able to investigate the accident almost immediately after it occurred. Furthermore, Petitioner asserts he does not need to provide a reasonable excuse for his delay in filing a Notice of Claim.

In opposition, Respondent contends that Petitioner has not offered a reasonable excuse for his delay and therefore the Petition should be denied. Respondent argues that it did not have actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Respondent argues that the Reports only state that the injury Petitioner sustained was a right-hand injury. Respondent asserts that the Petition states that Petitioner sustained a left-knee injury, including a torn meniscus, which was not stated in any of the Reports.

Respondent contends that Petitioner has failed to demonstrate a lack of prejudice. Respondent argues that Petitioner has deprived it of the opportunity to conduct an investigation, including collecting evidence, interviewing witnesses, and preparing defenses against Petitioner's claims. Moreover, Respondent asserts that it has not had the opportunity to request or inspect Petitioner's medical records or demand a physical examination pursuant to GML § 50-h(1) to assess liability.

Legal Standard

General Municipal Law § 50-e(1)(a) states that notice of a claim against a municipality must be served within ninety days after the claim arises. Notice of claim requirements are intended to protect the municipality and governmental entities from "unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a claim while the facts are still 'fresh.'" *Matter of Nieves v New York Health & Hosps. Corp.*, 34 A.D. 3d 336, 337 [1st Dept 2006].

Section 50-e(5) of the General Municipal Law permits the courts to extend the time to serve a notice of claim, in its discretion. In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e (5), the key factors considered are "[1] whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, [2] 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 [3] whether the delay would substantially prejudice the municipality in its defense." *Id.* "Moreover, the presence or absence of any one factor is not determinative." *Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]. "The failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez*, 69 A.D. 3d at 442.

Where "employees were directly involved in the incident" the First Department will hold that the municipalities "acquired actual knowledge of the essential facts constituting petitioner's claim". *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], aff'd, 140 A.D.3d 449 [N.Y. App. Div. 2016]. "[I]n order for a report to provide actual knowledge of the essential facts, one must be able to readily infer from the report that a potentially actionable wrong had been committed by the municipal corporation." *Id.*

A plaintiff must show that the delay would not substantially prejudice the defendant so that failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Id.* "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." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017]. "The mere passage of time is not alone a sufficient basis to deny leave to file a late notice of claim. (*Trejo v. City of New York*, 156 A.D.2d 164, 548 N.Y.S.2d 208 [notice filed 13 years after

injury])." *Holmes by Holloway v. City of New York*, 189 A.D.2d 676, 677–78, 592 N.-Y.S.2d 371, 372 [1993].

Discussion

Petitioner does not provide a reasonable excuse for the failure to serve the Notice of Claim within 90 days, nevertheless "[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez*, 69 A.D. 3d at 442.

Respondent "acquired actual knowledge of the essential facts constituting petitioner's claim, based on the reports." *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], aff'd, 140 A.D.3d 449 [N.Y. App. Div. 2016]. The NYPD prepared "Line-of-Duty Injury Report", "Aided Report Worksheet" and "Witness Statement" on the same day as the accident occurred. Respondent would have actual knowledge of the facts and circumstances surrounding the incident.

Furthermore, Petitioner has demonstrated that its "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Velazquez*, 69 A.D. 3d at 442. The participants and witnesses involved in the incident are known to the Respondent and are available. Moreover, the supervisor who prepared the "Line-of-Duty" report is available to be interviewed or deposed. "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." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017].

General Municipal Law § 50–e (5) "should not operate as a device to defeat the rights of persons with legitimate claims." *Matter of Annis v. New York City Tr. Auth.*, 108 A.D.2d 643, 644 [1st Dept 1985]. Therefore, the Petition should be granted, and the Notice of Claim served upon Respondent is timely filed *nunc pro tunc.*

Wherefore, it is hereby

ORDERED that this motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: MAY 3, 2019

Eileen A. Rakower, J.S.C.