

Matter of Kirkland v City of New York

2020 NY Slip Op 32938(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 156264/2020

Judge: Eileen A. Rakower

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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Application of
*NIA KIRKLAND,***

Petitioner,

INDEX NO. 156264/2020
MOTION DATE
MOTION SEQ. NO. **1**
MOTION CAL. NO.

For Leave to Serve and File Late Notice of Claim against

THE CITY OF NEW YORK,

Respondent.

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED



Cross-Motion: Yes X No

Petitioner Nia Kirkland (“Petitioner”) brings this action, pursuant to General Municipal Law § 50-e(5) for an Order granting leave to serve a Late Notice of Claim, *nunc pro tunc*, against Respondent The City of New York (“Respondent”). The Notice of Claim seeks to recover for the injuries sustained in a motor vehicle accident on February 24, 2020 in front of 243 West 42nd Street, in the County, City and State of New York (the “Accident”). There is no opposition.

Background/Factual Allegations

Petitioner alleges that on or about February 24, 2020, at approximately 12:45 p.m., in front of 243 West 42nd Street, in the County, City and State of New York, Petitioner, an on-duty Detective employed by the New York City Police Department (the “NYPD”), was the operator of “RMP number 401317” which was struck by a motor vehicle operated by Alimov Alisher with New York registration number T770582C, which caused Petitioner’s right shoulder to come into contact with an unpadding printer in her vehicle.

Petitioner alleges that she suffered “[i]njury and trauma to right shoulder; injury and trauma to back; continuing pain, suffering and disability; loss of overtime earnings; bodily injuries, the nature and extent of which are not presently known.” (Notice of Claim, Exhibit A).

Parties’ Contentions

According to the Notice of Claim, the date of the incident is February 24, 2020. Therefore, the deadline to file the Notice of Claim was May 24, 2020. Petitioner filed a proposed Notice of Claim on August 4, 2020 and therefore failed to serve a Notice of Claim within the requisite 90-day period¹. Petitioner brought the pending motion for leave to serve a late Notice of claim on August 10, 2020. That date is within one year and 90 days of the date the claim allegedly accrued and

¹ On March 7, 2020, Governor Cuomo issued Executive Order No. 202, which declared a State of Emergency for the entire State of New York, due to the increasing transmission of COVID-19. Thereafter, on March 20, 2020, the Governor issued Executive Order No. 202.8, entitled “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency,” which temporarily suspended or modified any time limitations set forth in any statute, legislative or administrative act, from March 20, 2020 until April 19, 2020. In particular, “[i]n accordance with the directive of the Chief Judge of the State to limit court operations to essential matters, ... any specific time limit for the commencement, filing, or service of any legal action, notice motion, or other process or proceeding ... is hereby tolled from the date of this executive order until April 19, 2020.”

On April 7, 2020, the Governor issued Executive Order No. 202.14, which continued the suspension and modifications of Executive Order No. 202.8 for thirty days until May 7, 2020.

On May 7, 2020, the Governor issued Executive Order 202.28, which continued the suspension and modifications of 202.8 and 201.14 for an additional thirty days until June 6, 2020.

On June 6, 2020, the Governor issued Executive Order No. 202.38, which continued the suspension and modifications of 202.14, 202.27 and 202.28 until July 6, 2020.

On July 6, 2020, the Governor issued Executive Order No. 202.48, which continued the suspension and modifications of 202.14, 202.27, 202.28 and 202.38 until August 5, 2020.

On August 5, 2020, the Governor issued Executive Order No. 202.55, which continued the suspension and modifications of 202.27, 202.28, 202.38 and 202. 48 until September 4, 2020.

On September 4, 2020, the Governor issued Executive Order No. 202.60, which continued the suspension and modifications of 202.27, 202.28, 202.38, 202. 48, and 202.55 until October 4, 2020.

therefore within the applicable statute of limitations. *See* Public Authorities Law § 1276.

Petitioner argues that Respondent acquired actual knowledge of the essential facts of the claim within 90 days of February 24, 2020. Petitioner asserts that the Line of Duty Injury Report prepared by the NYPD on February 24, 2020, sets forth the date, time and place of the accident, the manner in which the Petitioner was injured and the approximate nature of her injuries. Petitioner argues that the Line of Duty Injury Report clearly states the specific cause of Petitioner's injuries and therefore is sufficient "to impart timely notice of this claim to the respondent because the report demonstrates a connection between the happening of the accident and negligence on the part of the City." Petitioner avers that at the time of the Accident, Petitioner was employed by the NYPD as a Police Officer and was acting within the scope and furtherance of her duties as Police Officer. Petitioner argues that she has been "repeatedly" examined by police surgeons for the alleged injuries within the 90 days, to determine whether Petitioner should be permitted to remain out of work or to return to work in a limited or restricted capacity and to determine the nature and extent of the medical treatment Petitioner should receive.

Moreover, Petitioner asserts that Respondent will not be prejudiced in its ability to investigate and defend this claim. Petitioner avers that the witnesses to the Accident are "very much available, including the individual actually involved in the incident [Petitioner], the witness (civilian Francis), and the supervisor who prepared and approved the Line of Duty Injury Report." Petitioner argues that "[t]o overcome Petitioner's *prima facie* showing of lack of prejudice, [Respondent] must produce an affidavit from someone with personal knowledge of the facts which specifies exactly how [Respondent] was prevented from investigating the merits of the claim because of the delay in serving the notice of claim; an affirmation from counsel complaining of the delay in serving the notice of claim is simply not sufficient." (Petitioner's Affirmation at 13). Petitioner further argues that because Respondent had actual knowledge of the essential facts of the claim and would not be prejudiced if the Court grants the Petition, Petitioner need not advance any excuse for the delay in serving the instant notice of claim.

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. The purpose of these notice of claim requirements are 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 50-2(5) of the General Municipal Law provides that a court may, in its discretion, grant or deny an application made to file a late notice of claim based on the consideration of a number of factors. 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.” N.Y. Gen. Mun. Law § 50 (McKinney). In addition, “the presence or absence of any one factor is not determinative.” *See also 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.” *Id.* at 442.

“The petitioners ignorance of the requirement that a notice of claim pursuant to General Municipal Law § 50-e must be served within 90 days after accrual of the claim is not a legally acceptable excuse.” *Ragin v. City of New York*, 222 A.D.2d 678 [1995].

“The most important factor ‘based on its placement in the statute and its relation to other relevant factors is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter.’ ” *D’Agostino v. City of New York*, 146 A.D.3d 880, 880, [2d Dept 2017]. The Petitioner must demonstrate that the municipality acquired actual knowledge. *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *aff d*, 140 A.D.3d 449 [1st Dept 2016].

“The direct involvement of the respondent’s employee in the accident itself, without more, is also not sufficient to establish that the respondents acquired actual notice of the essential facts constituting the claim.” *D’Agostino*, 146 A.D.3d at 881. Where “the municipality’s employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that it committed a potentially actionable wrong, the municipality can be found to have notice.” *Jaffier v. City of New York*, 148 A.D.3d 1021,1023 [2d Dept 2017]. “In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which

liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves.” *D’Agostino*, 146 A.D.3d at 880-81.

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.” *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *aff’d*, 140 A.D.3d 449 [1st Dept 2016]. “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 [1993].

Discussion

Petitioner does not provide a reasonable excuse for the failure to serve the Notice of Claim within 90-days. However, “[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application.” *Velazquez*, 69 A.D. 3d at 442. As noted by Petitioner, the pandemic forced certain filings to be delayed, and the Governor’s Executive Order froze the statute of limitations during much of this time.

Moreover, Petitioner has demonstrated that 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]. Petitioner was employed by the NYPD as a Police Officer and was acting within the scope and furtherance of her duties as Police Officer. The Line of Duty Injury Report prepared by the NYPD on February 24, 2020, sets forth the date, time and place of the accident, the manner in which the Petitioner was injured and the approximate nature of her injuries. The Line of Duty Injury Report states “[a]t 1245 hours PO Kirkland conducted a car stop in front of 243 West 42 Street. At which point the civilian motorist did back up and collide with the RMP front bumper. When the vehicle collided with the RMP PO Kirklands (sic) arm hit the back of the printer causing pain/swelling and right shoulder contusion/strain to her right shoulder and right arm.” Consequently,

Respondents had knowledge of a potentially actionable wrong, constituting actual notice. *See Jaffier*, 148 A.D.3d at 1023.

Furthermore, Petitioner has demonstrated that his “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. “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 witnesses to the Accident are available, including Petitioner, a civilian witness listed on the Police Accident Report and the supervisor who prepared and approved the Line of Duty Injury Report. Respondent has failed to submit any opposition showing how they would be prejudiced for Petitioner’s failure to serve a timely Notice of Claim. Respondent will not suffer substantial prejudice from the late Notice of Claim and the statute of limitations was tolled by the Executive Order in response to the pandemic. Therefore, the Petition should be granted without opposition.

Wherefore it is hereby

ORDERED that the motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is granted without opposition.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 8, 2020

ENTER: _____



J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION