| **Singh v City of New York** |
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| 2020 NY Slip Op 33981(U) |
| December 3, 2020 |
| Supreme Court, New York County |
| Docket Number: 155247/2020 |
| Judge: Eileen A. Rakower |
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER** **PART 6**
***Justice***

***AMARNATH SINGH,***

**Petitioner,**

**- against -**

***THE CITY OF NEW YORK,***

**Respondent.**

**INDEX NO. 155247/2020**
**MOTION DATE**
**MOTION SEQ. NO. 1**
**MOTION CAL. NO.**

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answer — Affidavits — Exhibits _____ | |
| Replying Affidavits | |

**Cross-Motion: Yes X No**

Petitioner Amarnath Singh ("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 alleges serious injuries sustained by Petitioner on June 25, 2019 at the New York City Subway Station located at 168th Street in Manhattan (the "Subject Premises"). The Subject Premises is allegedly owned by Respondent. Respondent opposes.

Petitioner alleges that on June 25, 2019, he was instructed by his employer the MTA, to go to the Subject Premises to inspect the fire extinguishers in an emergency stairwell located on the northbound #1 train platform. Petitioner asserts that:

> As he descended an emergency staircase, he stepped onto a concrete platform at the bottom of said staircase. A portion of the concrete suddenly gave way and he fell approximately 30 feet to a pit below. A metal plate covered a portion of the platform but did not cover the section that gave way resulting in his fall… Members of the New York City Police Department and EMS responded to the scene.

Petitioner further alleges that as a result of the accident, he sustained "extremely serious injuries including the tearing of both rotator cuffs requiring surgery; a herniated nucleus pulposus at C5-C6 with nerve root impingement at C7; a herniated nucleus pulposus at T8-T9 with nerve root encroachment at T9; and bulges at L3-L4 and L4-L5 with annular tears and nerve root impingement at L5."

Parties' Contentions

According to the Notice of Claim, the date of the incident is June 25, 2019. Therefore, the deadline to file the Notice of Claim was September 23, 2019. Petitioner filed a proposed Notice of Claim on July 10, 2020 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 July 10, 2020. That date is within one year and 90 days of the date the claim allegedly accrued and therefore within the applicable statute of limitations. *See* Public Authorities Law § 1276.

Petitioner argues that there is a reasonable excuse for the delay in failing to timely serve the Notice of Claim. Petitioner asserts that he was in "excruciating pain" following the accident and "underwent various medical treatments, therapies, and surgeries." Petitioner further asserts that his highest level of education is high school and he is "unsophisticated and was unaware that in addition to the worker's compensation claim, he was eligible to bring a third-party suit against the owner of the premises" Petitioner argues that once he hired counsel, they "immediately instituted an investigation into the facts and circumstances of this matter."

Petitioner asserts that Respondent had timely notice of the accident. Petitioner argues that Police Officers from the NYPD and members of EMS, who are employees and/or agents of Respondent immediately responded to the scene. Petitioner contends that NYPD Officer Kevin J. Brabazon created a detailed aided report, AID#: 2019-033-001173, which was approved by Sergeant Phillip Bowles of the 033 Precinct (the "Report"). Petitioner argues that the Report:

> [S]tates the facts and circumstances of how, when, and where this accident occurred. It indicates that petitioner fell in a hole on the platform approximately 30 feet into a pit below. The report then gives the actual location of the stairwell as ES-302N on the N/B #1 platform. The report further details the name of petitioner; including his MTA ID number; the tax ID number of the police officers; the

> shield number of the EMS individual who administered aid; describes the petitioner's injuries; and indicates he was transported to St. Luke's Hospital.

Additionally, Petitioner asserts that Respondent took affirmative action after the accident. Petitioner contends that a visit to the Subject Premises on June 27, 2020, shows that the entrance to the stairway is locked and a sign posted on the door states: "warning, do not enter, area has structural defects!" Petitioner asserts that even if the sign existed on June 25, 2019, the door was open and any writing on the door would not have been seen. Petitioner argues that "it is only through discovery proceedings that petitioner can establish whether that sign was placed either before or after the accident." Petitioner asserts that construction work consisting of replacing elevators at the Subject Premises was ongoing at or near the location of the accident. Petitioner further argues that discovery is needed to determine whether Respondent "was aware of this ongoing construction and therefore visited the construction site or had its representatives at that site." Petitioner argues that he "has met his threshold burden in showing the lack of substantial prejudice" to Respondent because agents of Respondent "immediately responded to the accident location; prepared a detailed report; and rendered aid to the petitioner."

In opposition, Respondent argues that Petitioner has a patently meritless claim because it is not the proper party to the action. Respondent asserts that it "is not responsible for the inspection, maintenance, operation, and repair of the [Subject Premises.]" Respondent argues that pursuant to the "agreement between [Respondent] and New York City Transit Authority (hereinafter 'NYCTA'), the [Subject Premises] of this alleged accident is subject to the Master Lease Agreement [(the 'Lease')]," which states that Respondent leases operations, control, and maintenance of the subway and related property to the NYCTA, which is a subsidiary of the Metropolitan Transit Authority ("MTA"). Respondent contends that Article I of the Lease defines "Leased Property" as "the transit facilities and any other materials, supplies, and property incidental to or necessary for the operation of such transit facilities...." Respondent further contends that Article II, Section 2.1 of the Lease states that Respondent "leases to [Transit] Authority . . . all of the transit facilities now owned or hereafter acquired or constructed by [Respondent] and any other materials, supplies and property incidental to or necessary for the operation of such transit facilities." Respondent asserts that Section 6.8 of the Lease states:

> The Authority covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against and final disposition of, any

> and all claims, actions or judgments including compensation claims and award and judgments on appeal, resulting from any accident or occurrence arising out of or in connection with the operation, management and control by the Authority of the Lease Property.

Respondent argues that the location where Petitioner's accident allegedly occurred falls squarely within the Lease and liability may not be imputed to Respondent.

Furthermore, Respondent contends that it is a separate entity from the MTA. Respondent argues that "[s]ince the MTA, NYCTA, and METRO-NORTH are all separate legal entities from [Respondent], and the subway is operated, maintained, and controlled by NYCTA and MTA, [Respondent] did not owe plaintiff a duty of reasonable care." Respondent asserts that since it "has relinquished control and supervision of the subject property, a Transit facility, the platform at the bottom of the emergency stairwell at the incident location is also outside the control of [Respondent]".

Moreover, Respondent asserts that even if it was a proper party to the action, Petitioner has failed to show any factor that would constitute a basis for the Court to grant leave to file a late notice of claim. Respondent argues that Petitioner failed to offer a reasonable excuse for his failure to timely file the Notice of Claim. Respondent asserts that Petitioner "did not provide any medical evidence to support his claim that he was incapacitated to the point where he could not comply with the statutory requirement to timely serve a notice of claim." Respondent argues that Petitioner fails to show how his alleged injuries caused him to become incapacitated to an extent that he could not comply with the statutory requirements of General Municipal Law § 50-e(5). Respondent further argues that claimed ignorance of the filing requirement does not constitute a reasonable excuse for delay and is an "inadequate explanation."

Respondent argues that Petitioner failed to meet his burden of demonstrating that Respondent received actual knowledge of the essential facts constituting the legal claim within 90 days or a reasonable time thereafter. Respondent asserts that the Report "provided facts regarding the incident, [however] it failed to connect the incident to any claim against the [Respondent." Respondent further asserts that Petitioner has failed to demonstrate that Respondent will not be prejudiced by the delay. Respondent argues that Petitioner "fails to address how [Respondent] will not be impacted by the nearly one-year-and-ninety-day delay in order to locate witnesses

while their memories were still fresh, or conduct a meaningful investigation of the [Subject Premises]."

In reply, Petitioner asserts that the accident was due to a structural defect on the Subject Premises. Petitioner argues that "[t]he law is well-settled that generally an out of possession landlord is not liable for a negligent condition on the property. However, there is a specific exception when dealing with a condition that is a structural defect." Petitioner asserts that he:

> was injured while descending an emergency interior staircase. Specifically, the abutting platform at the bottom of the staircase collapsed, causing him to fall approximately 30 feet down a shaft. As stated in the affidavit of Dr. William Marletta, a Certified Safety Professional, annexed hereto as Exhibit "A", this emergency staircase and the abutting platform are an integral structure of a building. The collapse of such a platform is considered a structural defect. Additionally, the CITY and/or NYCTA confirmed that this area had a structural defect. Annexed hereto as Exhibit "B", is a photograph of a sign on the door leading to the staircase which states the following: "Warning do not enter area has structural defects!"

Petitioner argues that Section 6.6. of the Lease states that Respondent "shall have the right to free access to make reasonable inspection of the leased property." Respondent further argues that Section 8.1 of the Lease, states that Respondent is responsible for the maintenance of service facilities on the Leased Property.

## 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]. "Ordinarily, courts should not delve into the merits of an action in determining an application to file a late notice except in the rare case when the claim

is "patently meritless" *Weiss v. The City of New York*, 237 A.D.2d 212 [1st Dept 1997].

The First Department in *McGuire v. City of New York*, 211 AD2d 428, 429 [1st Dept 1995] held that:

> The City was properly dismissed from the action in view of plaintiff's positions that he slipped on either the street level step or second top step of a stairway leading down to a subway station, since, in either case, the accident occurred at a location incidental to or necessary for the operation of the subway station, and therefore on "lease property" within the meaning of the 1953 lease in which the City relinquished possession and control of all of its transit facilities to the Transit Authority (*see*, *Mattera v. City of New York*, 169 A.D.2d 759, 565 N.Y.S.2d 126).

Discussion

Petitioner's claims against Respondent are patently meritless. Respondent is not the proper party to the action. Respondent and NYCTA entered into an agreement, where Respondent leases operation, control, and maintenance of the subway and related property. The Lease defines "Leased Property" in Article I as "the transit facilities and any other materials, supplies, and property incidental to or necessary for the operation of such transit facilities...." Additionally, Section 2.1 of the Lease states that: "[Respondent] leases to [Transit] Authority . . . all of the transit facilities now owned or hereafter acquired or constructed by [Respondent] and any other materials, supplies and property incidental to or necessary for the operation of such transit facilities." Moreover, Section 6.8 of the Lease states:

> The Authority covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against and final disposition of, any and all claims, actions or judgments including compensation claims and award and judgments on appeal, resulting from any accident or occurrence arising out of or in connection with the operation, management and control by the Authority of the Lease Property.

Petitioner alleges that "a portion of concrete suddenly gave way and he fell approximately 30 feet to a pit below" as he was going down an emergency staircase at the Subject Premises. The alleged "accident occurred at a location incidental to or necessary for the operation of the subway station, and therefore on 'lease property' within the meaning of the 1953 lease in which the City relinquished possession and control of all of its transit facilities to the Transit Authority." *See McGuire*, 211 AD2d at 429.

Further, Petitioner fails to establish that Respondent will not be prejudiced by the delay. Petitioner points out that there was ongoing construction near to the accident site consisting of replacing elevators. Changes in the area would render inspection at this late time meaningless. Therefore, the Petition should be denied.

Wherefore it is hereby

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

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

**Dated: December 3, 2020**

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**