O'Sullivan v Manhattan & Bronx Surface Tr. Operating Auth.
2020 NY Slip Op 34073(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 158935/2020
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

ENID SCHNEIDER O'SULLIVAN,

Petitioner,

- against -

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Respondent.

INDEX NO. 158935/2020
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 Enid Schneider O'Sullivan ("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 Manhattan and Bronx Surface Transit Operating Authority ("Respondent"). The Notice of Claim seeks to recover for the personal injuries sustained in a motor vehicle accident on September 24, 2019 at the intersection of 3rd Avenue and East 74th Street, New York, New York (the "Accident"). There is no opposition.

Background/Factual Allegations

Petitioner alleges that on September 24, 2019, at approximately 8:55p.m., at the intersection of 3rd Avenue and East 74th Street, New York, New York, Petitioner was the passenger of the "M31 bus/motor vehicle Bus # 3925 [the 'Bus']… when it stopped short, causing Petitioner to be forcefully thrown to the floor of said Bus, and thereby causing petitioner to sustained severe and serious personal injuries."

Petitioner asserts that on or about October 29, 2019, Petitioner filed a Notice of Claim with the MTA Metropolitan Transportation Authority and MTA Bus Company, and on or about November 1, 2019, Petitioner filed a Notice of Claim

with the MTA New York City Transit Authority and "John Doe", name of driver being unknown, c/o MTA New York City Transit Authority. Petitioner contends that on December 13, 2019, the MTA New York City Transit Authority scheduled a statutory hearing in this claim. Petitioner asserts that the hearing scheduled for December 13, 2019 was adjourned to February 20, 2020 and then adjourned from February 20, 2020 by the Authority without a future date.

Petitioner asserts that on or about October 8, 2019, Petitioner's counsel submitted an application for No-Fault Benefits on behalf of Petitioner to the Metropolitan Transit Authority. Petitioner contends that during investigation of the claim, Petitioner's counsel became aware that Respondent may have also been responsible for the maintenance and operation of the M31 Bus # 3925 on the date of the Accident.

Petitioner's Contentions

According to the Notice of Claim, the date of the incident is September 24, 2019. Therefore, the deadline to file the Notice of Claim was December 23, 2019. Petitioner filed a proposed Notice of Claim on October 24, 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 October 22, 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 Respondent is a public corporation as defined in Section 66 of the General Construction Law of the State of New York and is a subsidiary of the MTA New York City Transit Authority, and Respondent operates buses in the Manhattan and the Bronx. Petitioner asserts that upon information and belief, Respondent owned, maintained and operated the Bus that was involved in the Accident. Petitioner argues that Respondent acquired knowledge of the facts of this claim within 90 days because one of its buses that it owns, maintains and operates was involved in the Accident. Petitioner argues that Respondent received notice of the claim when an application for no-fault benefits were filed with Respondent's parent company, MTA New York City Transit Authority on October 8, 2019. Additionally, Petitioner asserts that Respondent received notice when the Notice of Claim was filed with the MTA Metropolitan Transportation Authority and MTA Bus Company MTA New York City Transit Authority. Petitioner argues that "there is no question that the allegations being made in the Notice of Claim concern the

negligence of the respondent, their agents, servants and employees. Petitioner asserts that the accident is "well documented."

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 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 petitioner 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], *affd*, 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 upon this respondent 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.

Moreover, Petitioner has demonstrated that Respondent "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]. Respondent is a public corporation as defined in Section 66 of the General Construction Law of the State of New York and is a subsidiary of the MTA New York City Transit Authority. Respondent received notice of the claim when an application for no-fault benefits were filed with Respondent's parent company, MTA New York City Transit Authority on October 8, 2019. Moreover, Petitioner filed a timely Notice of Claim with the MTA New York City Transit Authority on November 1, 2019. Consequently, Respondent had

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

Furthermore, Petitioner has demonstrated that her "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. Respondent will not suffer substantial prejudice from the late Notice of Claim. Therefore, the Petition is 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: December 9, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION