Kugel v Broaway 280 Park Fee LLC
2021 NY Slip Op 31801(U)
January 22, 2021
Supreme Court, New York County
Docket Number: 157131/2020
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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JARED KUGEL,

Plaintiff,

- v -

BROADWAY 280 PARK FEE LLC C/O BROADWAY PARTNERS, FERRAN CONTRACTING CORP., THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY

Defendant.

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INDEX NO. 157131/2020

MOTION DATE 01/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37

were read on this motion to/for DISMISSAL

Upon the foregoing documents, the motion by the Metropolitan Transportation Authority to dismiss is denied and plaintiff's cross-motion for leave to serve a late notice of claim and amend the pleadings is granted.

First, the proposed notice of claim is not time barred, as the Court agrees that the series of Executive Orders that Governor Cuomo issued during the current pandemic tolled the statute of limitations by the plain meaning of these executive orders. Most specifically, Executive Order 202.67, the final of these orders, at multiple points, indicates that what has occurred through his orders is the "tolling" of the statute of limitations. The MTA's citing of *Scheja v Sosa* 4 AD 3d 410 is misplaced, simply by the difference in the wording of the executive orders in question. Governor Pataki, back in 2001, following the 9/11 attacks. made it clear that the statutes of limitations had been suspended and would expire on a date certain. Governor Cuomo, by contrast, in 2020, has done no such thing.

As to the lack of a demand set forth by the plaintiff, the Court agrees with plaintiff that such failure to do so is not jurisdictional and that there is a lack of prejudice on the part of the plaintiff. The MTA claims that this lack of a demand has inhibited the MTA from investigating the claim. However, in the instant matter, there is no indication that the MTA attempted to settle the claim after the summons and complaint, but rather their strategy was to move to dismiss due to the lack of the service of a notice of claim. Thus, the Court does not see any prejudice to what appears to be a technical violation and deems dismissal of the action unwarranted. Rather, the Court agrees that the amended summons and complaint filed in this action be deemed as the demand required by statute.

As to the cross-motion to allow a late filing of a notice of claim, the Court uses its discretion to permit such filing. It is well settled that there is a three-part test to determine whether plaintiff should be given leave to serve a late notice of claim. One is whether the municipality "acquired actual knowledge of the essential facts constituting the claim within [ninety days] or with a reasonable time thereafter." *General Municipal Law Section 50-e(5)*. Second, the plaintiff is required to show a reasonable excuse for the delay, and finally, the plaintiff must demonstrate there is no prejudice to the municipality for the granting of the application. If plaintiff satisfies its burden, the burden then shifts to the municipality to show that they are substantially prejudiced by the late service. (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016])

The plaintiff has provided a reasonable excuse for the proposed late service in this action. In this instance, the reason for the late notice of claim is due to the delay in response to a FOIL request following the accident. It appears there are multiple overlapping entities involved at the location of the accident, and thus, it was difficult for the plaintiff to immediately ascertain them.

This being written, the Court finds that the MTA was notified a reasonable time following the 90 days following the accident, considering the need for the FOIL request.

Finally, the Court finds that plaintiff has established no prejudice to the MTA. It appears that no one from the MTA was an eyewitness to the accident, so it is likely that any defense of the MTA will be through its records. While the MTA might have been able to conduct inspections if they had been made aware of the incident within 90 days, such prejudice is overcome by the other factors at work here. Accordingly, it is hereby

ORDERED that the notice of claim is deemed timely served *nunc pro tunc*; and it is further

ORDERED that the defendants shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days from the date of service of this Order with Notice of Entry.

1/22/2021
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE