S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

In the Matter of the Claim of
RICKY GRANT,

Petitioner,

-against-

TOWN OF NORTH HEMPSTEAD and TOWN OF NORTH HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY,

Respondents.
for leave to file a late Notice of Claim

Motion Sequence #1
Submitted February 9, 2008
XXX

INDEX NO: 22797/07

The following papers were read on this petition:

Notice of Motion/Order to Show Cause 1
CDA Affidavit in Opposition.....2
CDA Memorandum of Law in Opposition.....3
TOWN Affirmation in Opposition 4
Reply Affirmation to CDA.....5
Reply Affirmation to TOWN.....6

Requested Relief

Petitioner, RICKEY GRANT, moves for an order, pursuant to General Municipal Law §50-e(5), granting leave to file a late notice of claim against the respondents, TOWN OF NORTH HEMPSTEAD (hereinafter referred to as the "TOWN") and TOWN OF NORTH HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY (hereinafter referred to as the

"CDA"). The TOWN and the CDA oppose the motion, which is determined as follows:

Background

This matter arises from an accident that occurred on May 31, 2007, at a construction site located at 701 Prospect Avenue and the intersection of Brush Hollow Road, Westbury, New York. Petitioner alleges that, at the time of the accident, he was a "lawful employee" at the premises and that, because of the respondents negligent ownership, operation and maintenance of the construction site, he "was caused to fall from a ladder after being electrocuted." Petitioner further alleges that he was injured because respondents failed to provide a safe place to work and proper equipment.

On the instant motion, counsel for petitioner states that his office was retained on October 16,2007, (after the time to file a Notice of Claim had expired), and that the office conducted a last owner search of the premises. He claims that his office learned that the area where the accident occurred was owned by the TOWN, and that the TOWN had granted an indenture to the CDA on April 11, 2006. The Court notes that no documentary evidence of same is annexed to the moving papers. It is counsel for petitioner's position that he has a reasonable excuse for failing to file a timely Notice of Claim against respondents because he was unaware that the premises where the accident occurred was owned by the TOWN and the CDA. Moreover, he states that, immediately after the accident, Mike, the foreman for the general contractor, Banta Homes Corp., who counsel claims is an agent for respondents, investigated the scene. Counsel for petitioner urges that the respondents ability to investigate the claim is no different at the present time than it would be had the Notice of Claim been timely filed and that petitioner has a meritorious cause of action under the Labor Law and should be permitted to file a Notice of Claim,

nunc pro tunc.

In opposition to the motion, the Executive Director for the CDA, Neville Mullings, claims that the CDA does not own or operate the premises and should not be a party to this lawsuit. He states that petitioner has not met the requirements to file a late Notice of Claim. Contrary to the last owner search conducted by petitioner's counsel, Director Mullings asserts that the clear findings of the last owner search, a copy of which is annexed to its opposition papers, indicates that the property, identified on the Nassau County Tax Map as Section 11, Block 100, Lots 122 and 123, was purchased from the CDA, as follows: Lot 122 purchased from the CDA by Bluestone Management Associates, LLC. (hereinafter referred to as "BLUESTONE"), by deed dated May 25, 2006, and Lot 123 deeded by Blue Cassel Site A Realty, an entity related to Bluestone, to the Nassau County Industrial Development Agency ("IDA"), by deed dated May 25, 2006. Director Mullings urges that Blue Cassel Site A Realty and the IDA are the owners of the property and were the owners on May 31, 2007, the date of the accident.

Director Mullings relates that the CDA is an Urban Renewal Agency operating under General Municipal Law §654, and that its mission is to improve blighted conditions in the TOWN, particularly in the New Cassel area. Mullings states that the CDA has undertaken an aggressive program to acquire blighted sites and, working with various levels of government, to seek development proposals for the properties. The subject location was one of such properties and, eventually Bluestone was selected for the project. Mullings contends that, as part of the process, the premises was deeded to Bluestone, on May 25, 2006, and that a portion was deeded by the entity related to Bluestone to the IDA to secure economic benefits for the project. Mullings asserts that since the closing on May 25, 2006,

the CDA has had no involvement with either Lot 122 and 123. It is the CDA's position that, as an employee of one of the construction contractors at the premises, petitioner's claim for personal injuries would be barred by the Workers' Compensation Law and that counsel for petitioner is attempting to "fabricate" the TOWN and CDA's involvement in the matter. Director Mullings states that the CDA and its employees had no knowledge of the incident, that petitioner has not put forth a reasonable excuse for the untimely filing of the Notice of Claim, that the premises is not owned by the TOWN or the CDA. He contends, even if it were, that the almost seven (7) month delay in the application would cause substantial prejudice and that the application should be denied.

Similarly, the TOWN opposes the motion and claims that the first notice of the alleged accident was received when the TOWN was served with the instant order to show cause and petition, on January 4, 2008, almost eight (8) months after the accident. It then informed its Building Department and Department of Public Works in January 2008. In sworn affidavits, various employees of the TOWN state that the TOWN neither performed any work at the premises nor entered into any contracts to perform, supervise or control any work at the site. It appears that the basis for serving a Notice of Claim on the TOWN is an indenture the TOWN granted to the co-respondent, the CDA, on April 11, 2006, however, counsel for the TOWN states that the deed reflects that the TOWN divested itself of any interest to the property by that instrument. Counsel for the TOWN argues that the TOWN did not own the property, or any part of it, in 2007, and there is no basis for petitioner's proposed claim against the TOWN. Additionally, counsel for the TOWN states that petitioner has not demonstrated any of the elements to warrant the late filing of a Notice of Claim, and that the petition should be denied.

In reply, counsel for petitioner states that the documentary evidence in opposition to the motion clearly show that the CDA retained various rights over the construction site and supervised, directed and controlled the construction work as the property was only "conditionally designated" to Bluestone. As to the TOWN, counsel for petitioner states that the TOWN retained "some sort of interest in the property" as it only discontinued and abandoned Brook Street, a portion of the premises, and can thus be liable to petitioner.

The Law

General Municipal Law (GML) § 50-e requires that before a plaintiff may sue a municipality, a Notice of Claim must be filed within ninety (90) days after the claim arises. Service of the Notice of Claim is a condition precedent to the commencement of an action or special proceeding. GML § 50-e. The statutory pre-condition serves "to enable municipalities to pass upon the merits of a claim before the initiation of a law suit and thereby forestall unnecessary law suits". *Alford v City of New York*, 115 AD2d 420, 496 NYS2d 224 (1st Dept. 1985) *affd.* 67NY2d 1019, 503 NYS2d 324, 494 NE2d 455 (C.A. 1986). Petitioner's failure to file a Notice of Claim within 90 days of accrual of the cause of action, and the failure to seek leave to file a late Notice of Claim prior to the expiration of the Statute of Limitations period to commence an action against the municipality requires that the Complaint be dismissed. See, *Hardie v New York City Health and Hospital Corp.*, 278 AD2d 453, 719 NYS2d 256 (2nd Dept. 2000); *Hall v City of New York*, AD3d 254, 768 NYS2d 2 (1st Dept. 2003); *Hall v Niagra Frontier Transportation Authority,* 206 AD2d 853, 615 NYS2d 205 (4th Dept. 1994). The Court has no discretion to extend the time once the Statute of Limitations has expired. See, *Hall v City of New York, supra.*

"It is well settled that in determining whether to permit service of a late notice under General Municipal Law §50-e, a court should consider all relevant facts and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporations defense would be substantially prejudiced by the delay". *Matarrese v New York City Health and Hospital Corporation,* 215 AD2d 7, 633 NYS2d 837 (2nd Dept. 1995); *see also, Cotton v County of Nassau*, 307 AD2d 965, 763 NYS2d 474 (2nd Dept. 2002), *appeal denied,* 1 NY3d 502, 775 NYS2d 239, 807 NE2d 289 (C.A. 2003); *Fierro v City of New York,* 271 AD2d 608, 706 NYS2d 451 (2nd Dept. 2000); *Acosta v City of New York,* 283 AD2d 489, 725 NYS2d 208 (2nd Dept. 2001); GML §50 (e)(5). While all of the above noted factors are relevant, a petitioner is not required to demonstrate that all four factors weigh in petitioners favor. Even where there is no reasonable excuse for petitioners delay, that does not compel denial of the application where respondent fails to prove that the delay was prejudicial to its defense particularly when it had actual knowledge of the facts within ninety (90) days of the incident. *Sloan v County of Westchester,* 175 AD2d 838, 573 NYS2d 310 (2nd Dept 1991).

Conclusion

After a careful reading of the submissions and consideration of all the relevant facts and circumstances herein, it is the judgment of the Court that there are no grounds for granting the requested relief. The Court finds that counsel has not provided a reasonable excuse for the delay, that petitioner has not proven that the municipalities had

actual knowledge of the alleged claim within the 90 day time frame, that no infant is involved and that the municipalities have demonstrated that they would be prejudiced in defending an action brought at this late date. Knowledge of the foreman employed by the general contractor cannot be imputed to the CDA or the TOWN (*Williams v City of Niagra Falls*, 244 AD2d 1006, 665 NYS2d 217 [4th Dept. 1997]), nor can petitioner's failure to timely retain an attorney to file a Notice of Claim be deemed excusable. *In re Martin*, 100 AD2d 879, 473 NYS2d 1021 (2nd Dept. 1984); *Ealey v City of New York*, 204 AD2d 720, 612 NYS2d 445 (2nd Dept. 1994); *Buddenhagen v Town of Brookhaven*, 212 AD2d 605, 622 NYS2d 547 (2nd Dept. 1995). The Court finds that respondents would face substantial prejudice if petitioner was permitted to file a late Notice of Claim, because the accident occurred at an active construction site where reconstruction of the circumstances existing at the time of accident is all but impossible. *Thom v Wappingers Falls*, 131 AD2d 855 (2nd Dept. 1987); *Williams v City of Niagra Falls*, *supra*. Accordingly, it is hereby

ORDERED, that the motion to file a late notice of claim against the TOWN OF NORTH HEMPSTEAD and the TOWN OF NORTH HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 13, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: Valdebenito & Ardito, Esqs.
Attorneys for Petitioner
1399 Franklin Avenue, Suite 303
Garden City, NY 11530

Mark A. Cuthbertson, Esq.
Attorney for Respondent Town of North Hempstead Community Development Agency
434 New York Avenue
Huntington, NY 11743

Richard S. Finkel, Esq.
Attorney for Respondent Town of North Hempstead
220 Plaindome Road
Manhasset, NY 11030

grant-northhempstead&northhempsteadcommunitydevelopment,#1/genmunicipal