Jammal v New York City Hous. Auth.
2018 NY Slip Op 30689(U)
April 16, 2018
Supreme Court, New York County
Docket Number: 155464/17
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--x

SALADIN JAMMAL,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

--x

DECISION AND ORDER

Index Number

155464/17

FRANK P. NERVO, J:

Plaintiff moves for an order deeming his notice of claim deemed timely served.

On reading the order to show cause dated June 29, 2017, the affirmation of Arkady Friedman in support of the motion, the affidavit of Saladin Jammal and the annexed exhibits, the affirmation in opposition to the motion of Thomas McEvoy and annexed exhibits and plaintiff's reply, it is

ORDERED that the motion is denied; and it is further

ORDERED that on the court's own motion, the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint.

Plaintiff served and filed his notice of claim on June 16, 2017, one year and ninety days after his March 17, 2016 accident. While the service and filing were well-beyond the statutory ninety day period in which to serve and file the notice, it was served and filed within the statute of limitations period. Nevertheless, given the factual deficiencies in the notice, defendant's lack of knowledge of the underlying events, the prejudice defendant will suffer and plaintiff's lack of an excuse for the very late filing, the court will not permit that filing and dismisses the complaint.

The proposed notice of claim alleges only that "At approximately 5:00 PM on March 17, 2016 while claimant was a lawful pedestrian on the pathway at or near the entrance to the premises located at 154 Broome Street, New York, New York 10022 (photos are annexed...) ...claimant was caused to be injured due to a trip and fall on a raised sidewalk flag." The document fails to give a precise location by showing the distance or direction from the entrance door. It fails to describe the length or depth of the alleged defect. The indistinct photographs merely show a sidewalk, without any indication of where it is.

The hospital records plaintiff submits with his affidavit indicate that he was seen at Mount Sinai Hospital on March 17, 2016; however, the records show that he was in the hospital at around 13:19, with laboratory notes at 15:08 and 15:27 (1:19 PM and 3:08 and 3:27), times prior to the time alleged in the notice of claim. The discharge instructions indicate that he was discharged at 8:18 PM, subsequent to the time of the alleged fall. In any event, plaintiff, in his affidavit, asserts that defendant has actual knowledge of the accident because other tenants in the building told him that they would notify defendant that he fell. Later, after he returned from the hospital, he told the building handyman, Glen Arroyo, that he fell on March 17, 2016. He does not state whether this was after his March 17th discharge or a subsequent discharge on March 21, 2016. Plaintiff does not say what, if anything, else he told Arroyo. He does not state that he gave him the precise location of the alleged defect; rather he only writes that Arroyo took down the information and told him that he would draft an incident report and send it to defendant. He does not allege that he reviewed or signed an incident report and does not allege that Arroyo sent it. Arroyo, in his affidavit submitted in opposition to the motion, states that " Petitioner never reported the incident to me, and I never spoke to him about it. I never advised Petitioner that I would report the incident to NYCHA or prepare an incident report, and I never did."

Plaintiff alleges that he could not file a notice of claim sooner than he did because the accident caused him to suffer disabling cognitive problems. Using sophisticated medical terms, plaintiff recounts his neurological problems. He writes that a May, 2017 " MRI of the brain revealed abnormal foci within the supratentorial white matter as well parenchymal volume loss. My doctors have told me that abnormal foci has an effect on cognition and the volume loss means that I have a loss of neurons and the connections between them." Plaintiff does not state the names of the doctors who gave him this information and does not submit any records indicating that he was given this advice.

Plaintiff concludes his affidavit stating that "Due to the severity of my injuries I continued to experience severe cognitive dysfunction and pain in my orbital bone and hands. After several months, I realized that the pain and my head issues are not going away and I decided to contact an attorney in February, 2017. Between February and June 2017, I worked closely with my attorneys to assist them in obtaining medical records to substantiate my claims."

The emergency room report dated March 16, 2016 finds that there was no evidence of intracranial mass lesion or hemorrhage . The radiologist only found some swelling over plaintiff's left orbital (eye) rim.

A Mount Sinai Discharge Summary dated March 21, 2016 states that plaintiff reported feeling "foggy" and "disconnected from his home and sense of responsibility". It notes that he reported trouble working on his computer. However, there is nothing in the document

indicating that there was a finding of neurological or cognitive problems; nothing in that document shows a connection between the fall and the problems plaintiff reported. The discharge summary concludes that plaintiff was medically stable for discharge to his home.

A June 13, 2017 radiology and imaging report from The Hospital For Special Surgery notes that plaintiff has a history of left periorbital swelling and memory deficit; however, it does not indicate when these matters arose or their cause. The report noted that there was no acute intracranial hemorrhage or mass. There was no evidence of hydrocephalus or recent ischemia or infarction. There was no indication of abnormal intracranial enhancement. There is a notation of chronic microangiopathic changes; however, again there is no indication of their origin or cause. The report concludes with the impression states that there is scattered abnormal foci within supratentorial white matter that are non-specific and that they likely reflect chronic microangiopathic change. There is nothing linking this condition to the accident and nothing indicating that it has any detrimental effect on plaintiff's memory or cognitive abilities.

Plaintiff retained counsel in February, 2017. However, he waited an additional four months to file his notice of claim on June 15, 2017, the last day to file before the statute of limitations ran.

Plaintiff fails to provide a reasonable excuse for his lengthy delay. He fails to show that defendant acquired actual notice of the alleged event. His notice of claim fails to allege factually of legally sufficient facts that would allow defendant to investigate the accident. He fails to show that defendant is not prejudiced by the long delay between the alleged accident and the filing. Therefore, he fails to show that his action is not barred by Public Housing Law §157 and General Municipal Law § 50 (e); he fails to show any facts or circumstances that would allow this court to permit a late filing under General Municipal Law § 50 (e)(5).

Plaintiff fails to provide any medical proof that he was unable to file a timely notice of claim because of a medical or cognitive problem. The records he submits are not certified and nothing in them states that plaintiff is disabled. He fails to submit an affidavit from a physician showing any impairment, let alone one that would prevent him from making a timely claim. (see *Matter of Casale v. City of New York,* 95 AD 3d 744) This court cannot, absent competent medical proof, interpret the records in order to come the conclusion of disability at which plaintiff and his counsel, both lay persons, arrived.

Even if plaintiff had demonstrated that he was disabled after the accident, neither he nor his attorney explain the additional four-month delay in filing after plaintiff retained that attorney. At best, the court can treat this as law office failure; however, this is unexcused law office failure that cannot justify the further delay. (*Santiago v. New York City Transit Authority,*85 AD 3d 628)

Defendant did not have actual notice of the accident. Arroyo, in a sworn statement, denies that plaintiff told him anything. In any event, even if Mr. Arroyo is incorrect, the facts plaintiff alleges are insufficient to show that defendant had actual knowledge of the claim. There is no indication that plaintiff told Arroyo of the precise location of the accident or that he described the defect. There is nothing in plaintiff's papers demonstrating that he told Arroyo that he was injured as a result of the accident. Therefore, the alleged oral statement to Arroyo did not give defendant actual notice of the claim. (*Chattergoon v. City of New York,* 161 AD3d 141, 142) Moreover, the indistinct photographs attached to the notice of claim do not provide notice of the location or nature of the defect. Defendant did not receive these photographs until a year and ninety days after the alleged accident and did not give defendant the opportunity to make a timely investigation. (see *Merino v. New York City Transit Authority,* 184 AD 2d 404)

Finally, plaintiff has not met his burden of establishing that defendant was not prejudiced by the long delay in serving the notice of claim. The court is aware of the Court of Appeals decision in *Matter of Newcomb v. Middle Country Central School District, (*28 NY3d 455) As the Court noted, plaintiff has the initial burden of showing that the municipal agency would not be prejudiced by the delay in filing the late notice. Nothing in plaintiff's papers demonstrates a lack of prejudice; as noted, nothing in his papers reveal any factors that would permit the late filing. His arguments did not shift the burden of showing prejudice to defendant. In any event, the facts in this case show that defendant was prejudiced by the delay. (see *Matter of Maldonado v. City of New York,* 152 AD3d, 522. 523)

In *Matter of Newcomb v. Middle County Central School District, id.,*there was nothing but respondent's speculation to support its contention that it was prejudiced by the delay. It merely speculated that the passage of time would allow witnesses to become unavailable. However, photographs contained in a police file showed the conditions that caused the accident and permitted the school district to reconstruct those conditions. That crucial factor is not present in this case, in which there are no witnesses, no usable photographs and the alleged defective condition is a cracked sidewalk, a transitory condition that the agency must promptly investigate. (see *Turkenitz v. City of New York,* 213 AD2d 266) In this case, where plaintiff demonstrated no factors allowing for a late notice, and particularly where the nature of the alleged condition makes the passage of time prejudicial, *Newcomb, id.* does not give this court the authority to permit the late notice. (see *Matter of Grajko v. City of New York,* 150 AD3d 595.

Although defendant did not cross-move to dismiss the action, the lack of a notice of claim means that the court has no subject matter jurisdiction in this matter. Therefore, it is dismissing the action on its own motion.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 16, 2018

ENTER:

JSC

HON. FRANK P. NERVO